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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 706.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MACKAY RADIO & TELEGRAPH COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT.

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No. 706

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT.

Statement of Facts.

On November 9, 1935, the Board issued its complaint charging that respondent was engaged in interstate commerce and that on October 5, 1935, it had discharged and refused to re-employ five employees because they had joined and assisted a labor organization known as American Radio Telegraphists Association (hereinafter referred to as A.R.T.A.) and had engaged in concerted activities with other employees for the purpose of collective bargaining and other mutual aid and protection (R. 3). Respondent answered, admitting it was engaged in interstate commerce, denying the other charges and alleging affirmatively that the five employees had not been discharged but had, on or about October 5, 1935, voluntarily left respondent's employment (R. 6).

On December 2, 1935, a hearing upon the charges was commenced before a Trial Examiner. The hearing was had from day to day. On December 16, 1935, the Board rested its case and asked and was granted leave to amend its complaint to conform to the proof (R. 859, 900). By its amendment the Board substituted for the allegation that respondent had *discharged* the five employees on October 5, 1935, the allegation that between October 7 and 10, 1935, respondent had refused to *re-employ* the five men (R. 7-9). The Board refers to this as changing the complaint in several "minor particulars" (P. Br. 5-6). Actually, it changed the case from a charge of wrongful discharge of persons employed to a case of wrongful refusal to re-employ persons *formerly* employed. It was stipulated that the allegations of the amended complaint be deemed denied (R. 900-901). Respondent's motion to dismiss, made at the conclusion of the Board's case, was denied (R. 857-860).

Respondent then introduced evidence pursuant to the issues tendered by the amended complaint. Without permitting the Trial Examiner, who saw the witnesses and heard the testimony, to make an Intermediate Report, the Board transferred the case to be continued before it in Washington, and heard oral argument (R. 18).

On February 20, 1936, the Board filed its Decision. It found that A.R.T.A. was divided into two divisions, one composed of the marine radio operators (who are employed by shipowners from lists of operators recommended by the radio companies) and one composed of land or point-to-point operators; that in June, 1935, A.R.T.A. presented to respondent in New York a proposed general agreement concerning wages and working conditions for the entire Mackay land or point-to-point system; that at the request of respondent's officials, A.R.T.A. consented to a postponement of consideration of the agreement because of contemplated bankruptcy proceedings that might affect the Mackay companies; that in September, 1935, the proposed agreement was again presented to respondent;

that respondent gave a leave of absence to one of its San Francisco employees, O. M. Salisbury, so that he might go to New York to assist A.R.T.A. in its negotiations in respect of this contract; that the A.R.T.A. marine operators who were, from time to time, employed by shipowners, also had presented to respondent a proposed system agreement the nature of which is not disclosed by the findings (R. 19-20). The Board did not make any finding as to the date of its presentation. Neither of said proposed agreements was offered in evidence at the hearing.

The Board further found that on September 13, 1935, Ellery Stone, vice president in charge of operations for respondent (R. 19), was in San Francisco; that A.R.T.A. members of the HB (San Francisco) office advised him that A. R. T.A. was considering joint action on the marine and point-to-point agreements; that Mr. Stone requested time to return to New York and study the point-to-point agreement; that this request was granted (R. 21).

There is no finding as to when Stone reached New York. There is no finding as to when negotiations started, what they were about, whether they concerned one or both of the agreements or what happened during the course of those negotiations. There is no finding that respondent did not negotiate in good faith. There is no finding that respondent abandoned negotiations or refused to negotiate further. There is no finding that negotiations reached a deadlock or that further negotiations would not have resulted in a peaceful settlement of whatever questions were the subject of the negotiations. There is no finding that negotiations failed.

The only finding in respect of what took place in New York is as follows:

> "On October 4th the A.R.T.A. negotiators in New York decided that a strike was advisable in view of the unsatisfactory state of the negotiations" (R. 21).

At midnight all of the San Francisco force then on duty went on strike (R. 21).

Under the Board's findings this is not a case where respondent provoked or prolonged a strike by refusing to negotiate or by any other means. It is a case where respondent's employees abandoned peaceful negotiations then in progress and adopted the use of the weapon of strike with its consequent interruption to interstate commerce.

The Board found that the strike lasted only four days at San Francisco, and that there, as well as elsewhere, it was a failure. The Board further found that during the strike respondent transferred operators to San Francisco from its offices in other cities; that they were to be permitted to remain permanently in San Francisco if they desired (R. 28); that five of these men chose to remain (R. 31); that respondent "reinstated" all but five of the sixty-eight strikers; that the reason that respondent refused to "reinstate" four of these strikers was because they were the leaders of the local which had just caused it to pass through a costly strike (R. 32); that the reason respondent refused "reinstatement" to the fifth man, P. D. Phelps, was because he was a member of the Local (R. 39); that Phelps had not been active in the Local's affairs, or in the strike (R. 37).

The Board's order is predicated upon the findings above referred to and unless they support the order, the Board was not entitled to a judgment enforcing its order. Counsel have attempted to supplement and amplify the findings by referring to the testimony, all of which, with regard to the negotiations in New York, is hearsay, sometimes thrice removed. The *findings* should be examined with care, for they constitute the foundation of the Board's order.

From these findings, the Board concluded, not that respondent had refused to re-employ the five men (which was the charge in the amended complaint), but that it had discharged them, and the Board ordered, not that the five men be re-employed, but that respondent cease and desist discharging them and that they be reinstated with full pay from the date of discharge until reinstatement less the amount earned subsequent to discharge "as shown in the findings of

fact" (R. 48). No provision was made for deduction of sums earned subsequent to the date of the hearing which commenced on December 2, 1935.

On March 2, 1936 the Board petitioned the Circuit Court of Appeals for the Ninth Circuit for enforcement of the order. On April 16, 1936 the case was submitted with leave to file additional briefs. On January 11, 1937, the Court entered its judgment denying enforcement of the Board's order. On February 9, 1937, the Board filed its "Petition for Leave to Introduce Additional Evidence and for a Rehearing" wherein it prayed that the Board be given leave to introduce additional evidence and for a rehearing "*in the event*" the Board should make new findings or a different order upon the basis of the additional evidence. The Board refers to this as a petition for rehearing (P. Br., 11). The petition was submitted on April 23, 1937 with leave to file briefs. On May 10, 1937, more than three months subsequent to the entry of the judgment of the court below, the Board filed a motion for leave to file a supplement to said petition, praying for a rehearing (R. 108-111). On May 17, 1937 the so called petition for rehearing was granted (R. 112). No order was made in respect of the petition for leave to adduce additional evidence. On June 14, 1937, and over the objection of counsel for respondent, the cause was argued and submitted and on October 19, 1937 (R. 112), the court issued its order again denying enforcement of the Board's order (R. 124).

Questions Presented.

We are unable wholly to agree with the Board's conception of the questions presented (P. Br. 2). Each of the first three questions, as stated by the Board, is predicated upon the *assumed fact* that the strike was "because of failure of negotiations concerning wages and terms of employment." There is no finding that the strike was because of failure of *any* negotiations. There is no finding that there was *any failure* of negotiations. There never was any allegation, in either complaint, of *any* failure of *any* nego-

tiations; or even that there ever were *any* negotiations. There never was a *hearing* upon any of those issues.

It is submitted, therefore, that those three "questions presented" as propounded by the Board, are irrelevant to the *case* presented upon the record now before this Court.

Our conception of the questions which are presented upon the record herein may be stated as follows:

1. Whether respondent was accorded due process of law, in the light of the fact that the Board's order is predicated upon an "unfair labor practice" which was withdrawn from the issues at the hearing before the Board; a question of fact which was not merely *omitted* from the issues, but was *excluded* therefrom by affirmative actions of the Board;

2. Whether there is any finding herein that the strikers ceased work as a consequence of or in connection with any current labor dispute, as defined in the Act;

3. Whether the Act empowers the Board to compel an employer to reemploy or "reinstate" employees who have abandoned negotiations and gone on strike, prior to any unfair labor practice, where the employer, after the strike and prior to any unfair practice, has permanently employed others in place of the strikers;

4. Whether, if the Act be construed to so empower the Board, it is violative, in this respect, of the Fifth Amendment;

5. Whether respondent was entitled, under Article III of the Constitution, to the independent judgment of the court below upon the *quasi*-jurisdictional facts;

6. Whether this case is properly before this Court in view of the fact that the writ of certiorari was not applied for within three months after the entry of the first final judgment of the court below;

7. Whether the Board's order was so arbitrary and capricious, in the light of all the circumstances, as to justify the judgment below, apart from all other considerations.

I. Respondent has not been accorded due process of law in that it was convicted of an unfair labor practice with which it was not charged and which the Board affirmatively excluded from the issues.

The Board's order is predicated upon the premise that at the time respondent refused to give employment to the five men in question, those men were then employees. The Board concluded that by refusing to "reinstate" the five men at the conclusion of the strike, and thereby "discharging" said "employees", respondent did, by each of said "discharges" engage in an unfair labor practice.

The Board's order was, briefly, that respondent cease and desist from "discharging" any of its "employees" because of membership in A. R. T. A.; that respondent offer the five men "reinstatement" to their former positions and that respondent make the five men whole (and more than whole) for any loss of pay suffered by reason of their "discharge" (R. 47-48). This order cannot be sustained unless the five men were employees at the time that respondent refused to take them back. Men who do not occupy the status of "employees" cannot be "discharged" nor can they be "reinstated". The Board's order is not that respondent cease and desist discriminating in the "hire" or "re-employment" of men; it is an order that respondent cease and desist "discharging" men.

The Board found that prior to the date of the claimed "discharge" these men had ceased work; that they went on strike. The Act defines the word "employees" as including persons who ceased work "as a consequence of or in connection with any current labor dispute or because of any unfair labor practice." If, therefore, these five men were "employees" at the time respondent refused to take them back and thus, as the Board concludes, "discharged" them, it must be because they ceased work in connection with a current labor dispute.[1]

---

[1]It never has been claimed herein that there was any unfair labor practice at any time prior to the time when the men applied for re-employment.

The question of whether the five men so ceased work was not an issue under the pleadings, was not claimed by the Board's counsel to be an issue and was never tried. The issue tried was whether respondent discriminated in the "hire" or "re-employment" of the five men; and respondent has been found guilty of discriminating by "discharging" said men. The Board did not attempt to prove that the men ceased work in connection with a current labor dispute or because of an unfair labor practice.

The charges made by the Board, somewhat ambiguously, in its original complaint were, in substance, two; certainly not more than two[2], to wit:

1. That respondent *discharged* the five men;
2. That respondent *refused* thereafter to *re-employ* them (R. 3, 4).

At the opening of the hearing, these issues were further narrowed by eliminating the claim of a wrongful discharge. Counsel for the Board, by his opening statement of what he intended to prove, eliminated entirely the question of a wrongful discharge and restricted the issues of fact to the single question of a wrongful *refusal* to *re-employ* (R. 134-5).

At the conclusion of the plaintiff's case, counsel for respondent made a motion to dismiss, in which he stated his understanding that the single issue of fact[2] was the alleged *refusal to re-employ.* (R. 857). Counsel for the Board did not dissent from this statement, but tacitly acquiesced therein. Respondent's counsel then suggested that if the Board did intend to charge any other unfair labor practice, it should be required to do so by filing an amended complaint at that time, before respondent should be called upon to produce its evidence, so that respondent might "know what it is rebutting". (R. 857). Thereupon the Trial Examiner suggested that counsel for the Board should then announce his intention of applying for leave to file an amended complaint, "if you

[2]Disregarding the charge of a company-dominated union, which was later dismissed (R. 39-44, 48).

intend to do so". Counsel for the Board then applied for leave to file an amended complaint "to conform to proof". (R. 859).

On the following day, counsel for the Board produced and filed his amended complaint. At the suggestion of the Trial Examiner, it was stipulated that "all of the allegations of this amended complaint be deemed denied by respondent", except that admissions in the original answer should be deemed to apply to the amended complaint. (R. 900-901).

That amended complaint (which has been so *industriously* ignored by the Board's counsel at all times since the Board's decision was filed)[3] restricted the issues of fact to the single question of a wrongful *refusal to re-employ* former employees.[4]

By the filing of the amended complaint, the Board approved and confirmed the action of its counsel in eliminating, by his opening statement, the issue of wrongful *discharge,* and restricting the issues of fact solely to the question of wrongfully *refusing to re-employ former employees.* Thus, naturally and necessarily, the respondent's evidence was directed and *limited* to this one issue.

The action of the Board, in preparing and filing that amended complaint, is highly significant in another aspect. It represented *the Board's appraisal of the evidence.* By preparing and filing that pleading, "to conform to the proof", after the plaintiff's evidence was all in, the Board went on record as declaring, in effect, that the evidence justified *only* the charge of wrongful *refusal to re-employ former employees.*[5]

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[3]In the Board's decision, the amended complaint is ignored throughout, except for the casual mention, in a footnote that "the complaint was amended * * * so as to make *a few* of the allegations conform to the proof * * *" (R. 17). (All italics herein are supplied.) So also, the Board's counsel, throughout their brief herein, *meticulously* ignore the amended complaint; merely remarking *en passant* that "the Board issued an amended complaint * * * changing the complaint in several *minor particulars* in order to conform it to the proof" (P. Br. 5).

[4]See footnote (2), supra.

[5]See footnote (2), supra.

Thus, the issue tried was not whether respondent discriminated by discharging employees (or by refusing to reinstate employees who had ceased work as a consequence of or in connection with a labor dispute or because of an unfair labor practice) but whether respondent discriminated by refusing to re-employ *former* employees. As employer cannot "re-employ" a man who is then and there his employee. He may "reinstate" him but he *cannot* "re-employ" him.

The issue was clear. The Board did not call even one witness to testify as to what transpired in New York whence apparently originated the strike order. The labor dispute, if any, occurred in New York because it was there that the A. R. T. A. representatives were supposed to be negotiating with respondent's representatives. If it had been material to prove that the men ceased work in connection with a current labor dispute, testimony as to what went on in New York was essential. The Board did not regard this testimony as material, and properly so, for there was no allegation that the men were employees, as defined in the Act or otherwise. There was no allegation that they had "ceased work in connection with a current labor dispute"; no allegation that the negotiations had failed; or that there had been any negotiations. There was not even an allegation that the men had ceased work. The allegation was that respondent had refused to "re-employ" men who were formerly employees. There would have been no difficulty in obtaining witnesses had it been material to prove what happened in New York. O. M. Salisbury, one of the A. R. T. A. representatives in New York, was present during the hearing and even took the witness stand to testify about other matters (R. 971, 185).

Had there been any issue upon the question of whether the men ceased work in connection with a current labor dispute, or any issue involving a "failure of negotiations", respondent could have called representatives of the company who participated therein. However, under the issues tendered by the amended complaint, such testimony would have been irrelevant and immaterial. No reason existed

for calling from New York to San Francisco, any one who may have been present at the negotiations, to testify about a matter which was not in issue.

Counsel's persistent disregard of the importance and significance of the amended complaint, enables them happily to ignore the unhappy fact that the entire order of the Board rests indispensably upon a question of fact as to which the respondent *never had a day in court.* The Board's order, in its entirety, rests upon its conclusion that respondent committed an unfair labor practice by *discharging* five *employees* (R. 46). The Board's finding that respondent "discharged" those employees "by refusing to reinstate [them] to employment" (R. 46), obviously means that respondent had wrongfully refused to reinstate in active service five employees who actually were its employees *at the time of such refusal.* The reinstatement to active service of a *present* employee is an entirely different matter from the *re-employment* of a *former* employee. Respondent could not *re-employ* one who was in its employ at that time.

It cannot be doubted that the Board knew, and had in mind the important difference between the *discharge* of an *existing* employee and the *re-employment* of a *former* employee. There could have been no other reason than this for the preparation and filing of the amended complaint, the sole effect of which was to eliminate the one charge and retain the other. This is confirmed by the Board's conclusions of law,—that respondent, by these *discharges,* "discriminated in regard to the *tenure* of employment" (R. 47, 5(a) and (b)). If the discrimination had consisted of a refusal to *re-employ,* the conclusion of law would have been "discrimination in regard to *hire*" (Act, Section 8 (3)).

If there can remain any possible doubt that the Board's decision and order are predicated *solely* upon a wrongful discharge, as distinguished from a wrongful refusal to re-employ, that doubt will be utterly dispelled by reference to the Board's order (R. 47-8). It orders respondent to cease and desist (a) "from *discharging* or threatening to *discharge* any of its employees * * * "; (R. 47) (b) It orders

respondent to "make whole said * * * [employees] for any loss of pay * * * by reason of their *discharge* * * * from the date of *his discharge* * * * the rate each was paid at the time of his *discharge.*" * * * (c) It orders respondent to "Post immediately notices * * * stating (1) that the respondent *will not discharge* * * * members of, or those desiring to become members of, the American Radio Telegraphists' Association * * * " for any cause whatsoever, not excluding theft, forgery, arson or murder (R. 48).

It is thus demonstrated that

a. Respondent was *tried* solely upon a single charge;[6] namely, wrongful refusal to re-employ former employees; the restriction of the issues to this single charge was emphasized by the opening statement of counsel and reaffirmed by the amended complaint filed in response to respondent's request "to know what it is rebutting" (R. 853).

b. Respondent was *convicted* of an entirely different charge, namely, wrongful discharge of existing employees; that charge was not merely *omitted* from the issues; it was *excluded* therefrom affirmatively and with exceptional emphasis.

The situation thus presented is much more grave, and cuts much more deeply than that which ordinarily is suggested by the contention that the allegations of the complaint do not sustain the Board's order. Here is a situation where the respondent has been utterly and completely deprived of its "day in court" upon the fundamental issue of fact upon which the Board's order is predicated. Every pertinent circumstance of the proceedings before the Board tended to assure respondent that it need defend itself only against the charge of wrongful refusal to re-employ former employees, to wit: the filing of an original complaint which alleged wrongful discharge and perhaps suggested the intent also to charge wrongful refusal to re-employ; the opening statement definitely eliminating the issue of wrong-

[6] See footnote (2) supra.

ful discharge and standing squarely and solely upon the issue of wrongful refusal to re-employ; the omission to offer evidence in support of the discarded issue; the filing of the amended complaint in response to respondent's demand to know, with certainty, the Board's claims. From the time of the opening statement, on the first day of the trial, until the filing of the Board's decision, two months after the conclusion of the trial, there was no issue in this proceeding as to any unfair labor practice other than the alleged wrongful refusal to re-employ former employees.[7]

A similar, but much less aggravated, situation came before this Court in *Federal Trade Commission* v. *Gratz*, 253 U. S. 421, 427, 430, wherein an order of the Commission was annulled upon the ground that it was not supported by the allegations of the complaint. No question of the sufficiency of the complaint had been raised, either before the Commission or in the Circuit Court of Appeals. The Court said:

> "Such an order should follow the complaint; otherwise it is improvident, and, when challenged, will be annulled by the Court". (p. 427.)

There was a strong dissenting opinion. The dissenting justices pointed out that "unfair methods of competition" are not defined in the statute; that it is the policy of that statute that the Commission, in its complaint, shall charge the facts of which it complains and shall make findings upon those issues; that it will then be for the Court to determine whether the facts found show "unfair methods of competition"; and that the allegations of the complaint therein were such that the respondent could not possibly have been misled to his injury. There is an important difference in the situation here. Each separate "unfair labor practice" is specifically defined in the Act. The respondent here was unequivocally charged with one specific unfair labor practice; was tried on that charge alone; and then was found guilty of an entirely distinct and different wrong.

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[7]See footnote (2), supra.

It is submitted that under the dissenting opinion in the *Gratz* case, as well as under the majority opinion, the order of the Board herein was "improvident". The dissenting justices said:

> "The function of the complaint is solely to advise the respondent of the charges made, so that he may have *due notice and full opportunity for a hearing thereon.* All that is requisite in a complaint before the Commission is that there be a *plain statement of the thing claimed to be wrong,* so that the respondent may be put upon his defense" (p. 430).

There was, in the amended complaint herein, just such a plain statement, but the thing claimed to be wrong was a distinct and different wrong from that of which respondent was found guilty. Respondent *never* "was put upon his defense" in respect of *that* wrong.

In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 47, this Court said:

> "The Act establishes standards *to which the Board must conform.* There must be a complaint, notice and hearing."

The Act provides that the complaint shall state the charges in respect of any unfair labor practice which the person complained against has engaged in [Sec. 10(b)]. The Board's complaint, as amended, charges discrimination by refusing to "re-employ" the five men. The Board's order is that respondent cease and desist "discharging" the five men. Respondent was never called upon to prove that the five men did not cease work in connection with a current labor dispute and therefore that they were not employees and could not be discharged.

The requirement that the complaint advise an employer of the charge against him is said by this Court to be one of the protective provisions securing the employer "protection against arbitrary action". In *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, it was held that none of these protective provisions had been trans-

gressed. We submit that in the case at bar a vital protective provision has been transgressed and that respondent has been the victim of arbitrary action.

Counsel's contention,[8] that respondent cannot complain because it failed to make objection at the hearing before the Board, is not well founded. Respondent had no opportunity to make this objection, for the reason that it did know or suspect, until after the Board's decision had been rendered, that it was to be found guilty of an unfair labor practice with which it was not charged and which had been excluded from the issues at the hearing before the Board.

The fact is that by the Board's own act, respondent was deprived of any opportunity to complain to the Board that the order was based upon an issue never tried. The Board's rules provide for the preparation by the Trial Examiner of an Intermediate Report to which a respondent can take exceptions.[9] It might well have been that if the Trial Examiner, who understood the status of the pleadings and heard the evidence, had been permitted to make his Report, it would have followed the issues. At least, if the Trial Examiner had made the same mistake that was made by the Board, respondent could have taken exception thereto. By refusing to permit the Trial Examiner to make an Intermediate Report, the Board deprived respondent of any possible opportunity to call to the attention of the Board the fact

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[8] P. Br. 36.

[9] "Sec. 32. After a hearing for the purpose of taking evidence upon a complaint, the Trial Examiner shall prepare an Intermediate Report (including findings of fact, separately stated) which he shall file with the Regional Director issuing the complaint, who will thereafter transmit the original of the Intermediate Report to the Board at Washington, D. C. and cause a copy thereof to be served upon each of the parties to the preceding. * * *"

Sec. 34. If any party desires to take an exception to the Intermediate Report or to any other part of the record * * * he shall within ten days * * * file with the Board at Washington, D. C., * * * a statement in writing setting forth such exceptions. * * *"

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that the findings and decision are upon an issue which has never been tried.

The Board followed this same *unusual*[10] procedure, of depriving itself and the employer of the benefit of a report of the Trial Examiner, in *Consolidated Edison Company of New York, Inc.* vs. *National Labor Relations Board* (C. C. A. 2, March 14, 1938). The Court there said:

> "This procedure is not one likely to inspire confidence in the impartiality of the proceedings. It results in findings of fact being made by persons who did not see the witnesses—a matter which may have far-reaching consequences in view of the very limited power conferred upon the Courts to review the Board's findings of fact."

In the absence of an Intermediate Report by the Trial Examiner, respondent had no opportunity whatsoever to make this objection before the Board. The Board cannot now complain of respondent's failure in this respect when the Board's own acts and the inadequacy of the Board's own procedure deprived respondent of its right to present its defense and of all opportunity to present said objection.

It is submitted that there has been a grave infringement, in this respect, of respondent's constitutionally-guaranteed rights of due process of law. This being so, the judgment of the court below, which denied the Board's petition for the enforcement of its order, was *correct* for this reason, apart from all other considerations.

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[10] "The usual practice of the Board is to permit the Trial Examiner to file an Intermediate Report and in such case, on request by respondent, to hear argument upon exceptions to that report." (P. Br. 6, footnote 1.)

II. The judgment of the court below denying enforcement of the Board's order should be affirmed because the Board failed to find that the five men refused employment at the conclusion of the strike were employees, as defined in the Act.

The Board ordered respondent to cease and desist discharging its employees, to reinstate five discharged employees and to pay them wages from the time of the discharge until the making of an offer of reinstatement. This order can be supported only if the five men were employees and were discharged. The Board did not find that they were employees. To the contrary, the Board found that on October 4, 1935, they voluntarily ceased work; that they "went on strike" (R. 21). Under the Act he who ceases work "as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice" is included within the definition of "employee". But there is no finding that the five men ceased work as a consequence of or in connection with a current labor dispute; there is no finding that they ceased work because of an unfair labor practice.

The findings disclose that in September 1935, an agreement concerning wages and working conditions for the operators employed by respondent to operate its point-to-point system, was presented by A. R. T. A. to respondent for its consideration. The marine operators had also presented to respondent, for its consideration a "system agreement" for marine operators, who are employed by the steamship companies (R. 20).[11] Thus, one proposed agreement involved respondent's employees and one did not.

Neither of these agreements was offered in evidence. The proposed marine agreement involving steamship com-

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[11]The record does not make the status of marine operators entirely clear, but it does show that the marine operators are employees, not of respondent, but of the shipowners (R. 1098). The assignment to or recommendation for the job is made by respondent (R. 281). The marine operator, as his name indicates, goes to sea (R. 153).

pany employees was called the "Marine Hiring Agreement" (R. 1099). The proposed point-to-point agreement involving respondent's employees was called the "Point-to-Point General Wage and Working Agreement" (R. 1099). The findings make it clear that the Board understood that the "Marine Hiring Agreement" referred to steamship employees for they refer to the charge that respondent "was *recommending* non-A. R. T. A. marine operators to the steamship companies" (R. 20).

The findings do not disclose what provisions the Marine Hiring Agreement contained, but it appears from the record, including the findings, that it did not involve the terms or conditions under which *respondent's* operators were employed. It may have involved terms or conditions of employment by shipowners and the part respondent was to play in recommending men for such employment.

The findings disclose that the marine and point-to-point divisions of A. R. T. A. resolved to unite for joint action on the two agreements so that one could not be adopted to the exclusion of the other (R. 21).

The Board's findings imply that A. R. T. A. representatives had some negotiations with respondent, for the finding is that they decided "a strike was advisable in view of the unsatisfactory state of the negotiations" (R. 21). Notwithstanding counsel's assertions (P. Br. 21), there is no finding whether these negotiations concerned the agreements above referred to or either of them; no finding what these negotiations concerned; no finding when they commenced; no finding that there was any controversy at all with reference to either of said agreements.

The mere presentation to respondent of the agreements did not constitute a controversy or dispute, especially where, as here, the union negotiators were not authorized to make any change therein. *Lauf* v. *E. G. Shinner & Co.* (decided Feb. 28, 1938) is believed not to be in point. In that case, this Court held that the refusal of an employer to comply with the demand that he compel his employees to join a certain union constituted a "labor dispute" as those words are

defined in the Norris-La Guardia Act. In the case at bar, there is, however, no finding of a refusal of any demand.

In fact, there is no finding as to what either party did in respect of the proposed agreements after they were submitted to respondent, and there could not well be such a finding because no person testified who had anything to do therewith. Yet the Board could have produced *competent* testimony as to what transpired in New York, because O. M. Salisbury, who apparently was present at the New York negotiations (R. 21) was present during the hearing before the Board and was even sworn as a witness (R. 971-2; 185).

The findings do disclose that after the A. R. T. A. abandoned whatever negotiations were had, respondent's employees at San Francisco went out on strike (R. 21). There is no finding as to who called the strike or why it was called. The minutes of the A. R. T. A. meeting of September 13, 1935, lead readily to the inference that the point-to-point operators walked out on a "sympathy strike" for the marine operators (Bd. Ex. 2, R. 1096). These minutes record Loudermilk's opinion "that the PTP [point to point] men should threaten a *sympathy* strike with the marine men if they were to refuse to sign their agreement" (R. 1099). Following this discussion a resolution was passed uniting the Point-to-Point and the Marine Divisions of the Local for the purpose of "joint action as pertains to any and all negotiations" with Respondent on the two contracts (R. 1099). Nothing in the record nor in the Board's findings rebuts the inference that this was a sympathy strike, nor is it inconsistent with the Board's finding that the strike was called because of the unsatisfactory state of negotiations. Counsel must have overlooked this evidence when they said, "There is no basis for respondent's contention that the strike in San Francisco, where the unfair labor practice occurred, was merely a sympathetic one; * * *." (P. Br. 14).

If there was a controversy and if it concerned the Marine Hiring Agreement, the controversy did not concern terms or conditions upon which respondent was employing or was to employ *its* operators. If the point-to-point men ceased

work because of some controversy involving the Marine Hiring Agreement (a sympathy strike), they did not cease work in connection with "a current labor dispute".

The mere finding that the men went on strike is not a finding that they ceased work in connection with a current labor dispute. If every strike is *per se* a labor dispute and strikers are thus included automatically in the definition of employees, (P. Br. 29, 33) it is necessary to "read out of the Act all of Section 2 (9), which limits the term "labor dispute" to controversies concerning terms of employment or representation of employees. Employees sometimes strike in sympathy with others. Sometimes they strike before any controversy has arisen, because of the whims of their leaders. For all that is shown by the findings, the men may have gone on strike for some such reason and not because of any controversy constituting a "labor dispute".

Counsel concede that "the findings of the Board did not state in so many words that the strike was a current labor dispute" (P. Br. 32). Respondent has never had the opportunity to call this defect to the attention of the Board. As pointed out above, the question of whether the men ceased work in connection with a current labor dispute was not even litigated, and respondent did not know it was involved until after the Board had made its findings.

Not only did the Board omit to find the ultimate fact as to why the men went on strike; it failed to find any facts from which it can be fairly concluded that there was a controversy, or if there was, what the controversy was about. The Board found that respondent's employees ceased work on October 4, 1935, but failed to find whether or not the quitting was in connection with a labor dispute. Under such findings it is impossible to support the Board's order requiring respondent to cease and desist discharging persons who were not found to be employees at the time of the discharge, or its order requiring reinstatement of such discharged persons. The judgment of the Court below denying enforcement of the Board's order should be affirmed.

The Board's realization of the weakness of its case is evidenced by its effort, at this very late day, to shift its position once more. It now urges, even in the absence of a finding that the men were employees, that its order be enforced upon the basis of discrimination in the *hire* of former employees (P. Br. 16, 19, 49-54). The answer to this is that the order says nothing about ceasing and desisting discriminating in the *hire* of men. It orders respondent to cease and desist *discharging* men. If the Board had intended to pursue the theory of discrimination in the hire of men (as was indicated in its amended complaint) it abandoned that theory when it prepared its order. Without here arguing what the Board might have done in respect of an order made upon the assumption that respondent discriminated in the hire of men (and an order compelling respondent to hire men gives rise to most serious constitutional questions) the fact is that the Board did not make such an order. Its order was that respondent cease and desist discharging employees and that order cannot be supported because there is no finding that the men refused employment were employees; and no finding of facts from which that conclusion follows.

III. The Board's order directing reinstatement of the men with back pay was an excess of the Board's authority under the Act.

A. The facts as found by the Board.

We will assume, without conceding and only for the purpose of the argument of this Point, that the Board found that the strikers ceased work in connection with a current labor dispute. Counsel for the Board assert that the Board found that the strike followed a *failure* of negotiations (P. Br. 14). They assume that to be the fact in their statement of "Questions Presented" (P. Br. 2). The Board did not find that negotiations had failed. Neither did it find that respondent had been guilty of any unfair labor practice prior to or during the strike.

According to the Board's findings, respondent was engaged in negotiating with representatives of A. R. T. A. when, in the midst of negotiations, the members of A. R. T. A. went on strike. The only finding on this subject was:

> "On October 4 the ARTA negotiators in New York decided that a strike was advisable in view of the unsatisfactory state of the negotiations." (R. 21).

The Board found that at midnight, all of the San Francisco force then on duty went on strike and that all but one or two employees joined in the strike (R. 21).

This is not a finding that negotiations failed; it is a finding that negotiations were abandoned by the employees. Negotiations do not fail until they have reached a deadlock; that is, until further negotiations will be of no avail. Perhaps the word "failed" could be used in the sense that negotiations failed when the employees abandoned them. But the employees did not cease negotiations because negotiations failed; the negotiations failed because the employees "walked out" in the midst of the negotiations.

The Board's findings do not support the statement in its Brief that "negotiations had continued for several months without success" (P. Br. 7). The findings disclose that negotiations did not commence until some time subsequent to September 13, 1935. There were no negotiations in June, 1935, when the A. R. T. A. point-to-point agreement was first presented to respondent. The members of A. R. T. A. at that time agreed that negotiations should be postponed because of contemplated bankruptcy proceedings involving respondent (R. 20). The agreement was again presented in September, 1935. No negotiations were requested until September 13th when A. R. T. A. representatives advised Stone, vice-president of respondent, that they were considering "joint action" on the marine and point-to-point agreement. Stone asked and was given time to return to New York and study the point-to-point agreement (R. 20-21).

There is no finding as to when negotiations commenced on the two agreements. Indeed, there is no finding that the negotiations which the employees abandoned even involved both of the proposed agreements. But assuming they did, there is no finding that such negotiations had been in progress for one week or one hour when the employees walked out. The findings do not support counsel's statement that negotiations continued for several months (P. Br. 29). Neither do the findings support counsel's statement that the employees had "continuously pressed" "demands" "for more than a month under repeated threats of strike" (P. Br. 31). They do not support the statement that respondent refused the "demands" "with counter-threats of retaliation."

Counsel apparently attempt to convey the impression that respondent had made an unsatisfactory counter-offer (P. Br. 30). The Board did not so find. All it found was that the negotiators became dissatisfied with the state of negotiations and the employees walked out. Counsel's statement is based upon a recital in the minutes of the A. R. T. A. meeting of Oct. 4, 1935. The minutes recited that Bash said that Salisbury said that Stone had made the counter-offer in question (R. 1101, 419). If the Board gave credence to this hearsay, twice removed, it is not apparent, because it made no finding based thereon.

Even if this hearsay were to be given serious consideration, it shows that negotiations were proceeding in the customary manner, with A. R. T. A. making demands and respondent offering substantial concessions. The Board does not call attention to any evidence that negotiations had reached the hopeless stage and, so far as we are aware, there was none. The Board's finding is clear enough that the employees walked out in the midst of the negotiations.

During the strike respondent transferred a number of its employees from other places to San Francisco with the understanding and promise that they could remain there if they wished (R. 28, 748, 817). Five remained. Therefore, at the end of the strike, there were five more

strikers than there were jobs. Respondent reemployed all but five of the sixty-eight strikers. The Board found that respondent's action in re-employing sixty-four members of the rank and file in preference to Loudermilk, Bash, Palmer and Rone was because those four were "the leaders of the Local which had just caused it to pass through a costly strike" (R. 32); that the sole reason respondent failed to re-employ Phelps was because he was a member of the Local (R. 39). Phelps was neither active in the Local's affairs nor in the strike (R. 37).

B. An employer may employ new workers during a strike, where he has not been guilty of an unfair labor practice, and at the conclusion of the strike, his failure to re-employ strikers whose jobs have been filled will not constitute an unfair labor practice.

Respondent is engaged, as a public utility, in the business of communication, under a mandatory duty to maintain that service for the benefit of the public.[12]

Respondent's employees went on strike at a time when it had not committed any infraction whatsoever of the Act. It was then respondent's right, if not its duty, to employ others to fill the place of the strikers, and, in connection therewith, to promise them permanent employment.

Unless it be concluded that all of the strikers in this case were entitled to their jobs when they asked for them, to the exclusion of the workers hired during the strike, respondent had a right to refuse employment to five strikers. This is a primary and fundamental premise. Whether it was an unfair labor practice to refuse to give preference to the other strikers rather than the *particular* five strikers here in question will be considered in subsequent subdivisions of this Point. To determine the soundness of the primary and fundamental premise we must determine whether the failure to discharge men hired during a strike which

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[12] "Section 201 (a). It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; * * *" (48 Stat. L. 1070; USCA Title 47, Sec. 201)..

was neither provoked nor prolonged by any unfair labor practice, and the failure to reemploy strikers in their stead, discouraged *membership* in a labor organization or interfered with the procedure of collective bargaining; and we must determine whether compulsory reinstatement of *all* such strikers would effectuate the policies of the Act.

This Court has made clear the purpose of the Act and the reason why it is a proper exercise of Congressional power to protect interstate commerce. Like the Railway Labor Act, the National Labor Relations Act provides machinery for the *peaceful* settlement of labor disputes. In both Acts, the machinery provided is negotiation by the employer with the representative of the employees. As this Court said in the *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45:

> "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act itself does not attempt to compel."

Since, as the Court there pointed out (p. 42), refusal to confer and negotiate has been "one of the most prolific causes" of strikes with the consequent interruptions of commerce, the requirement of negotiation not only provides machinery for the settlement of labor disputes but removes one of the principal causes of such disputes.

Both Acts are designed to provide a means of avoiding interruptions to commerce caused by strikes. The purpose of each is thus to protect and promote interstate commerce. The principles of both Acts are the same. In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines* (decided February 28, 1938) this Court said:

> "Congress, in enacting the National Labor Relations Act, had in mind the experience in the administration of the Railway Labor Act, and declared that the former was an amplification and further clarification of the principles of the latter."

In *The Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 130, this Court said that the provisions of the Railway Labor Act requiring the carrier to treat with the representatives chosen by the employees were "in all material respects analogous to the statute here under consideration." In the same case, referring to the National Labor Relations Act, the court stated that "the experience under the Railway Labor Act has demonstrated the efficacy of such legislation in *preventing* industrial *strikes* and obviating interference with the flow of interstate commerce."

In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, (decided February 28, 1938) this Court said:

> "The history of the Act and its language show that its ruling purpose was to protect interstate commerce by securing to employees the rights established by Section 7 to organize, to bargain collectively through representatives of their own choosing, and to engage in concerted activity for that and other purposes."

It is not the purpose of the Act either to strengthen or to weaken labor organizations. It is made an unfair labor practice to discriminate against an employee for the purpose of either *encouraging or discouraging* membership in a labor organization. It is not the purpose of the Act to compel the employer to employ either union men or non-union men; or to compel the employer to accede to the demands of his employees; or to compel the employees to accede to the demands of the employer. It is not the purpose to give either the employer or the employee an advantage in any labor dispute that may occur. Rather, it is the purpose to allow economic forces to have free play subject only to the requirement that employers must negotiate with the representatives of employees, and that they must not interfere with employees in their choice of representatives. The purpose is to provide a forum wherein these economic forces can exert their energies, and the

forum is to be the council table at which shall sit the representatives of the employees and the representatives of the employers. By this means Congress has sought to protect interstate commerce from interruptions caused by strikes. The philosophy of the Act, as we understand this Court's exposition of its purposes, is that if employers and employees, through their representatives, will sit down and peacefully negotiate, many strikes will be prevented; that if employers will cease interfering with the free right of employees to choose their representatives for such negotiation an important cause of strikes will be eliminated; and that, if strikes do occur, the negotiation which the Act requires between employers and strikers will enable the early settlement of many strikes.

Where the employer has, prior to and during a strike, fully complied with the provisions of the Act, he should be free to hire new employees to carry on his business. If he hires new employees, he will have more employees than there are jobs, for under the Act strikers who cease work in connection with a current labor dispute are also defined as employees. If the strikers offer to come back to work, the employer must leave someone without a job. Must he discharge his new employees and take back all the strikers? If it be held that he must do so, then the striker will be guaranteed his job whenever he wishes to return to work, even though the employer be blameless.

If the employer in such case is guilty of violating the Act by retaining his new employees and refusing to replace them with strikers, then the Act guarantees the striker his job whenever he wants it. The only exception would be where the employer closes down his business forever. The Act does not so provide, and it is our contention that to so construe the Act would thwart rather than accomplish its purposes. By guaranteeing a striker his job, where the strike was neither provoked nor prolonged by the refusal of the employer to negotiate or by any other unfair labor practice, peaceful negotiation would be discouraged and strikes would be encouraged. Such a result is not in accord

with the purposes of the Act, nor is it consistent with its philosophy.

The Act does not make it an unfair labor practice to discriminate against striking employees because of their activity in an unprovoked strike. It is made an unfair labor practice to discourage *membership* in a labor organization. But the failure of some of the strikers to get back their jobs is not because of their *membership* in a labor organization. It is because they have voluntarily, without any wrongful or provocative act of the employer, opened their jobs to others. The reason they are not re-employed is not because they are members of a union but because they have struck under such circumstances that the employer has rightfully employed others to take their places.

In the free play of economic forces which are loosed by a strike, the employer seeks to avoid a strike because by completely or partially closing down his business he is unable to secure revenue to pay his rent, interest on loans, and other fixed charges, is unable to comply with his contracts and stands in danger of permanently losing many of his customers to his competitors. The employee seeks to avoid a strike because during a strike he is partially without income and because there is a danger that his job will not be open for him when he returns. True, the loss of income is not always a compelling force, because under modern conditions nationally organized unions have funds with which to recompense the striker for a part of his loss of income and because federal relief agencies are available to strikers. But there is always, or at least always has been, the danger of losing his job—a real deterrent against strikes. This deterrent does not abrogate the *right* to strike (Sec. 13) but it at least makes peaceful negotiations more attractive.

To construe the Act so that such striking employees are guaranteed their jobs would paralyze one of these economic forces, and indeed the most important one so far as the employees are concerned. If the employee can strike knowing that his job will be waiting for him, or that if it is not

waiting for him the Labor Board will compel the employer to make it available to him, together with full pay for time lost, then one of the great economic forces which would tend to keep industry functioning and commerce moving is gone. It cannot possibly facilitate or encourage collective bargaining to provide that an employee who strikes in the midst of the procedure of collective bargaining and at a time when the employer is fully complying with the provisions of the Act, cannot be refused reemployment because of his strike activity, or, to put it affirmatively, to provide that under such circumstances a striker must be reemployed.

The failure to reemploy a striker does not interfere with employees in their free choice of representatives. Under the Act, the employees, whether they be real employees or striking employees, are free to choose representatives. Under the Act the employer must negotiate with his employees whether they be real employees or striking employees. They may choose a striker as their representative. The failure to reemploy a striker does not interfere with the procedure of negotiation. Indeed, the failure to employ a striker in no way changes the status which he has voluntarily assumed. The striker has voluntarily chosen to cease work. The failure to reemploy him leaves him in the status he has chosen to occupy.

In the case at bar, according to the Board's findings, the refusal to reemploy at least one of the five strikers (Phelps) was caused solely by the fact that he was a member of the union. Since all the strikers were members of the union, it was inevitable that any five refused employment would be union members. Refusing employment to Phelps would not discourage union membership any more than refusing employment to some other union man. The refusal to reemploy him has neither encouraged or discouraged membership in A. R. T. A. It has left him in the status he voluntarily assumed without provocation on the part of respondent.

The refusal to reemploy a striker under the circumstances presented in this case is in no sense analogous to that which arises when an employer *discharges* an employee because of union activity. There the employer *alters* the employee's status to his detriment and in a manner calculated to destroy his free right to choose his representatives for collective bargaining. It makes it appear unsafe to belong to a union and thus discourages membership. Nor is it analogous to the situation where the employer wilfully provokes a strike and thus, by indirection, gets rid of employees whom he could not lawfully discharge. The courts will not permit an employer to do by indirection that which the Act proscribes. Nor is it analogous to the situation where an employer provokes or prolongs a strike by refusal to negotiate or by any other unfair labor practice.

Counsel cite a number of cases (P. Br. 22) in support of their contention that "the Board has the power exercised in the case at bar." They are not cases where the employees walked out in the midst of negotiations. In each of them, (with the exception of *Mooresville Cotton Mills* v. *National Labor Relations Board,* (C. C. A. 4) 94 F. (2d) 61, wherein a petition for rehearing is pending), the employer had refused to negotiate and had thus violated the Act. His right to select his employees had thus become "vulnerable".

Respondent had willingly recognized A. R. T. A. as the employees' bargaining agent; had negotiated with it willingly and freely; and, apparently, was actually in the process of such negotiations on the very day when the strike occurred. Respondent's "ordinary right to select its employees" therefore remained "invulnerable" at that time.

> "From the date of respondents' first unfair practice, its ordinary right to select its employees became vulnerable" (*Black Diamond Steamship Corporation* v. *National Labor Relations Board* (C.C.A. 2, decided February 14, 1938).[13]

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[13] The Board repeatedly invokes the authority of this decision and relies heavily thereon (P. Br. 22, 40, 41, 49).

The present situation is one where, without provocation, the employee has chosen his status and has risked his job in order to use the strike as a weapon, instead of resorting to peaceful negotiation, to achieve his end. The failure to re-employ him leaves the employee where he placed himself.

The well settled rules of statutory construction support our view. In *United States* v. *Katz*, 271 U. S. 354, Mr. Justice Stone, speaking for the court, said:

> "All laws are to be given a sensible construction; and a literal application of a statute, which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it, *consistent with the legislative purpose.* [Citing cases.] In ascertaining that purpose, we may examine the title of the Act [citing cases], the source in previous legislation of the particular provision in question [citing cases], and *the legislative scheme or plan by which the general purpose of the Act is to be carried out* [citing cases]."

C. Where the employer has not discriminated against union men in re-employing men at the conclusion of a strike and where the lack of available jobs has made it necessary that he refuse employment to some of the strikers, discrimination as between members of the same union does not discourage membership therein.

The Board has found that four of the strikers were not refused employment simply because they were strikers but because they were "the leaders of the Local which had just caused it (respondent) to pass through a costly strike." (R. 32.) Its conclusion was that this constituted an unfair labor practice.

We assume, as a premise and as argued above, that respondent had the right to refuse employment to five strikers, having lawfully hired five other men during the unprovoked strike. Five strikers had to be left out. Does the Act make it an unfair labor practice to select for re-employment the rank-and-file members of the union in preference to the leaders who interrupted the negotiations by the strike, at a time when there had not been any unfair labor practice?

It may be conceded that this would have a tendency to discourage the calling of unprovoked strikes in the midst of peaceful negotiations.

As we understand it, the Act is not intended to encourage such strikes by improving the economic position of the leaders of such strikes, or otherwise. We do not deny that respondent's employees had a *right* to strike when they did, but we do deny that favoring the leaders of such a strike at the expense of their followers will "effectuate the purposes of the Act." The Act seeks to protect employees in their right to bargain collectively and to choose representatives for that purpose. It does not seek to protect the leaders of unions, as against the rank and file, regardless of what they may do.

Whenever the employer does something that hampers the procedure of collective bargaining, whether by discriminating against employees on account of their union membership or otherwise, he may fall afoul of the Act. But where that which he does has no tendency to interfere with employees in their full exercise of collective bargaining, then the Act has no application.

We say that the preference in re-employment which was accorded herein to the rank and file members of the union, rather than to the leaders who had led them into an unprovoked and disastrous strike, did not interfere or tend to interfere with any activity protected by or sought to be facilitated by the Act. The restriction of the employer's right to hire and discharge his employees can be justified only to the extent that such restriction is necessary and proper to accomplish the purposes of the Act. The Act should be so construed as to accomplish its purposes, not to defeat them. Any exercise by the employer of his right to re-employ men after an unprovoked strike which does not interfere with the scheme of peaceful negotiation which the Act fosters, does not constitute an unfair labor practice.

An order compelling an employer in re-employing strikers to re-employ strike leaders would not "effectuate the policies of this Act." It would encourage resort to the strike

instead of resort to peaceful negotiation. To thus guarantee the jobs of leaders who take the rank and file into a strike which is unprovoked by any unfair labor practice is to put a premium on striking instead of bargaining.

After all it is only common justice that if anyone must suffer because of this uncalled for strike, it should be the leaders who caused it. One of the four leaders who were the last to apply for re-employment, was man enough to take this position. The Board found that he said that he held off applying for reinstatement because "he did not think that he, an officer in the Local, should apply for work until the other men had returned." (R. 25.)

When members of a union apply for re-employment at the conclusion of an unprovoked strike and there are more applicants than there are jobs, the selection of some of them, no matter who they are, does not discourage *membership* in a union. The discouragement of union *leaders* from leading their followers into unprovoked and unnecessary strikes will not tend to discourage *membership* in the union. It will have a negative tendency to encourage collective bargaining, in lieu of the strike, and thus will tend, in the long run, to *encourage* union membership.

D. Assuming, without conceding, that the action of respondent in selecting the rank and file members of the union for re-employment as against certain leaders thereof was an unfair labor practice, the order of reinstatement was in excess of the Board's authority under the Act.

An employee who strikes prior to any unfair labor practice has no assurance that his job will be open for him when and if he offers to return to work. The Act does not constitute a guarantee to him that his job will be waiting.[14] He has no absolute *right* to be re-employed. It is believed that discrimination as between such strikers does not discourage membership in the union. But if it does discourage membership, the most that a striker has, is a right to *apply* for re-employment and to be considered without any prejudice because of his union membership or activity.

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[14] See Paragraph B of this Point.

This right to ask re-employment free from any discrimination arising from union activities, does not give to any individual striker the absolute right to a job. In the case at bar, there were five more applicants than there were jobs. No one applicant had the *right* to be re-employed.

The Board has found that when respondent considered the applications of the five men, it rejected four because they were leaders in the Local that went on strike and one because he was a member of A. R. T. A. We are assuming, solely for the purpose of this discussion, that by so doing, respondent violated the Act. It is our contention that the five men have no more *right* to a job now than they had in October 1935 when they made application. It is our further contention that the Act was never intended to guarantee anyone a job; that it is remedial in character and that the five men are entitled to no more than to be restored to the status that they occupied at the time they were refused employment, i. e., applicants for jobs, and entitled to fair consideration as such.

If it was an unfair labor practice to select the other members of A. R. T. A., rather than these five men, it is the first and only one, according to the record, of which respondent has ever been guilty. The five men taken on during the strike, who elected to remain, were taken on at a time when respondent's record was entirely clean; a time admittedly *prior* to the occurrence of any unfair labor practice; a time when respondent's "ordinary right to select his employees had not become vulnerable." So far as appears from the record, respondent's present employees are competent and entirely blameless. As between them and respondent, it would be a legal wrong, as well as ethically unjust, for respondent now to discharge them.

It is submitted that the Congress never intended to authorize the Board to compel an employer to discharge competent employees, who were rightfully employed by a blameless employer, at a time when there had been no infraction of the Act, solely in order to make room for strikers who had elected to strike, without the provocation of *any* infrac-

tion of the Act, instead of negotiating in conformity with the policy of the Act.

What, then, was the *status* of the strikers when they elected to abandon the strike and sought to return to work?

They were "striking employees." They were not "employees" in the true legal sense of the word; neither were they "strangers" to the employer. They were in "a relationship between employer and employee that is neither that of a general employer and employee, nor that of employer and employee seeking work from them as strangers." "It is true that a striker is not technically an employee." *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134, 137.[15] This does not mean that they could return to work before a new contract should be made between them and respondents.[16]

What, then, were the rights ("guaranteed by the Act") of these "striking employees", who were neither employees nor strangers, at the time they sought to return to work?

For the purpose of this question, we shall *assume* (but, emphatically, we do not *concede*) that they had "ceased work in connection with a current labor dispute" (Section 2(3)). So assuming, they were "employees", as defined by the Act. They were entitled, therefore to "reinstatement", *if* the Board should find, upon the *evidence,* that such reinstatement "will effectuate the policies of this Act" (Section 10(c)).

Reinstatement to what? Reinstatement to the *status quo,* which *existed at the time the unfair labor practice occurred.*[17]

Counsel concede this principle, though differing with us upon what constituted the *status quo* when the five men were

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[15]This decision also is cited as authority, and much relied on by the Board. (Pet. Br. 22, 40, 41, 43, 49.)

[16]See Point IV of this brief.

[17]*Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board, supra; National Labor Relations Board* v. *Remington Rand, Inc.*, C. C. A. 2, decided Feb. 14, 1938 (This decision is likewise cited as authority by the Board. P. Br. 33, 41.)

refused employment. They state, "Power was vested in the Board to require reinstatement of employees discriminated against in violation of the Act in order that the coercive effect of such discrimination might be dissipated by restoration of the status quo existing prior to its commission" (P. Br. 38-39).

The status of the five men at the time they were refused re-employment was that of applicants for jobs. They had no right to the jobs; their right, under the facts here assumed, was to ask and receive consideration of their applications, without discrimination which would discourage union membership. Reinstatement to that status will restore the five men to the *status quo* existing prior to the occurrence of the assumed discrimination. If there were then or should thereafter be places open, the five men were entitled to fair consideration for those jobs.

But, on the other hand, if there were no places open, and no places then held by men who could be justly discharged because they had been hired after the unfair labor practice, *then* the utmost right of the returning strikers was to be "placed on a preferencial list."[18] This is the express holding of *Black Diamond Steamship Corp.* v. *National Labor Relation Board,* and the necessary result of the reasoning and conclusions expressed in *National Labor Relation Board* v. *Remington Rand, Inc.*

Incidentally, it may be of interest to note that this meaning of the word "reinstatement", which was adopted and applied in the two last mentioned cases is precisely that which was adopted by Judge Wilbur, in his second opinion below, (R. 118), which counsel are pleased to characterize as "an extraordinarily strained meaning" (P. Br. 38). It also is precisely the meaning which was adopted and given application by the Board in its own decisions in *Jeffery-De Witt Insulator Co.* v. *National Labor Relations Board* and *Black Diamond Steamship Corp.* v. *National Labor Re-*

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[18] *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board, supra.*

lations Board. We gladly join counsel for the Board in invoking the Court's attention to these two decisions.

If employees resort to the strike *before* an unfair labor practice has occurred, they relinquish thereby any right they may have had to be reinstated to active service with back pay. This is so, even though the strike is called as a consequence of a current labor dispute.

> "All engineers were employees under the Act, having left work in consequence of labor disputes. But having done so *before,* any unfair labor practice, they were relying, and were *only* entitled to rely, upon a test of economic strength."[19]
>
> "The Act so far as reinstatement is concerned *only applies after* there has been an unfair labor practice."[19]
>
> "So far as there were not places filled by engineers hired *after* December 14 [the date of the unfair labor practice] *no offers to reinstate needed to be made.*"[19]

When a strike is called in the absence of an unfair labor practice, *even where negotiations have failed,* to require the employer to give back their jobs to the strikers, "would indeed load the scales in an industrial dispute".[20] How much more so, where, as here, the strike is called in the very midst of negotiations which *have not failed.* The use of the strike "in a controversy *where the men are right,* ought not * * * to be prejudicial to them."[20] Can it be said that "the men are right", when they strike in the very midst of peaceable negotiations which have *not failed?*

This brings us to the question: What remedy was the Board authorized by the Act to apply in the present case, by way of "reinstatement", as that word is construed in the only applicable court decisions, and as construed by the Board in its own decisions?

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[19] *Black Diamond Steamship Corp.* v. *National Labor Relations Board, supra.*

[20] *National Labor Relations Board* v. *Remington Rand, Inc., supra.*

Bearing in mind that these men struck in the midst of negotiations which had not failed, and before any unfair labor practice; that their places had been rightfully filled by others employed *before* any unfair labor practice; that there were no places open to them; and that no places could be made for them other than by wrongfully discharging other employees who, both in law and in justice, were entitled to remain; it is submitted that there can be but one answer to this question. The Board was authorized (under the facts assumed for the purposes of this question) to order "reinstatement" only to the extent of restoring these men to their *status quo,* to wit, applicants for jobs with a right to fair consideration for employment, when vacancies should occur. Respondent placed these men upon a preference list, before any complaint had been made to the Board (R. 24, 1121, 1131, 1136, 1139).

The Board's order, insofar as it required the reinstatement of these men to active service, with back pay, was in excess of the authority conferred upon the Board by the Act,[21] even if we assume, in the Board's favor, all of the following disputed facts: that the negotiations had failed; that the strike was in consequence of a current labor dispute; and that respondent committed an unfair labor practice in rejecting these particular men.

It may be conceded, for the purpose of this argument, that, if this were an unfair labor practice, the Board would be authorized thereby to make an order to cease and desist from discriminating in regard to hire and tenure of employment. But no such order was made. The order was to "cease and desist from discharging or threatening to dis-

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[21] "The * * * powers granted the Board under Sec. 10(c) are *only remedial;* they are designed to enable it to restore the *status quo* as nearly as possible had the wrong not been committed; *further it may not go.*" *National Labor Relations Board* v. *Remington Rand, Inc., supra; Black Diamond Steamship Corp.* v. *National Labor Relations Board, supra.*

charge * * *." (R. 47). These men were not entitled to get their jobs back because there were no jobs open, and none which lawfully could be made open to them.

As they were not entitled to be restored to active list, it cannot be said that they were "discharged" by placing them on the preference list, which was *all* and *more* than they were entitled to.

Therefore, resolving every factual question in favor of the petitioner, the fact remains that the order was in excess of the Board's authority under the Act; and the decision of the court below should be affirmed.

The vast extent of the authority and power claimed by the Board is now revealed in stark simplicity. The Board's thesis herein, when reduced to its fundamentals, may be stated as follows:

> (a) Every strike is *per se* a current labor dispute (P. Br. 29, 33); (regardless of the occasion, the purpose or the circumstances thereof); therefore,
>
> (b) All strikers retain *in full* the status of employees (P. Br. 42); therefore,
>
> (c) All strikers entitled to get their jobs back, whenever they may see fit to ask for them; therefore,
>
> (d) Every refusal of an employee to reinstate strikers, upon demand therefor, is *wrongful;* therefore,
>
> (e) The Board is authorized and empowered to order the reinstatement of strikers, with an award of back pay, in every case where their demand for reinstatement has been refused.

Thus the Act, as construed by the Board, *guarantees* their jobs to employees, upon whatever terms and conditions

they may demand, unless the employer shall elect to give up his business.

We cannot believe that the Congress ever intended that this Act should have such far reaching consequences.

IV. If the provisions of the Act be construed to empower the Board to order respondent to re-employ strikers where the strike was not provoked or prolonged by any unfair labor practice, such provisions constitute such an arbitrary, capricious and unreasonable taking of property and interference with the liberty of contract that they are violative of the Fifth Amendment.

A. When an employee strikes without provocation, he terminates his contract of employment.

The Act does not expressly empower the Board to order an employer to cease and desist refusing to hire or re-employ any particular men. Such an order, in negative phraseology, would compel an employer to hire certain men. The Act does not expressly empower the Board to compel an employer to hire or to re-employ former employees. It should not be construed to give the Board such power because to do so would make such provisions violative of the Fifth Amendment.

An employee who strikes without provocation terminates his contract of employment. It is true that upon such termination he does not occupy the same status as an employee who quits with the intention of never returning. At the same moment the striker quits he offers to accept re-employment upon the terms which he demands or upon such other terms as he and his employer can thereafter agree upon, whereas the employee who quits makes no such offer. For want of a better term he who strikes is called a "striking employee." In *Michaelson* v. *United States* (C. C. A. 7), 291 F. 940, 942 (reversed on other grounds 266

U. S. 42), which the Board relies upon (P. Br. 42), the court states that strikers "say to their employer":

> " 'We shall stop work until you are in what we may consider a more reasonable state of mind. We shall deprive you of our labor as a legitimate means of exerting economic pressure to induce you to yield. If we do go out, we shall remain at hand, ready to *negotiate* with you concerning fair wages and working rules, and ready to return to work *the moment we can agree.*' "

However, the employee cannot come back to work unless the employer accepts his offer nor can the employer force him to come back to work unless the employee agrees upon the terms of employment. A new offer and acceptance—a new contract—is essential to again create the relationship of employer and employee.[22]

This Court has recognized that the legal status of employer and employee is terminated by a strike. In *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, a union declared a strike against complainant's plant. Only two of complainant's employees, Churchill and Cook, went out on strike. Mr. Chief Justice Taft, speaking for the court, referred to Churchill and Cook as "the ex-employees." (p. 207.)

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[22] The contention (P. Br. 42): "The Act clearly provides that during a labor dispute *the strikers* retain IN FULL the status of employees", illustrates the extreme lengths to which the Board is driven in its efforts to justify its order. If that assertion were true, it would follow that the strikers breached their employment contract during every day that they remained on strike. It indubitably is the duty of a "full-status" employee to report for work and to work for his employer during working hours, obeying the reasonable directions of the employer. Obviously, an employer cannot compel a striker to return to work. Nor can the striker return to work, without entering into a new contract relation with the employer.

Every strike "concerning terms, tenure or conditions of employment" *necessarily presupposes an abrogation of the former contract* and the proposal to enter into a *new and different contract.* It *cannot* mean anything other than this.

In *Truax* v. *Corrigan,* 257 U. S. 312, Mr. Chief Justice Taft referred at page 340 to "ex-employees on a strike." At page 320 he referred to the cooks and waiters who were on strike as being "formerly in the employ of plaintiffs." The question involved was whether an Arizona statute deprived the employer of equal protection of the laws and thus violated the Fourteenth Amendment. The court stated at page 338:

> "It is urged that this court has frequently recognized the special classification of the relations of employees and employers as proper and necessary for the welfare of the community and requiring special treatment."

The court then cited a number of cases involving workmen's compensation statutes. It then said at page 339:

> "It seems a far cry from classification on the basis of the relation of employer and employee in respect of injuries received in course of employment to classification based on the relation of employer, not to an employee, *but to one who has ceased to be so,* in respect of torts thereafter committed by such *ex-employee* on the business and property right of the employer."

Dissenting opinions were filed in that case. In the dissenting opinion written by Mr. Justice Pitney he referred at page 350 to the strike there involved as "a dispute between employer and former employees."

In *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, Mr. Justice Brandeis filed a dissenting opinion, in which he stated that the acts of employees in striking "sever the continuity of the legal relationship."

The legal status of a striking employee and employer is made clear in *Brown* v. *Central West Coal Co.,* 200 Mich. 174, 166 N. W. 850, where a question arose under the Workmen's Compensation Act as to the length of time during which a man had been continuously employed. The court said:

> "When the decedent, a locomotive crane operator, left the employ of the coal company on the occasion of

> a strike, June 21st, the relations of master and servant, of employer and employe, were at an end. It required a new contract, a new employment, to restore such relations."

There are numerous cases to the same effect.[23]

The fact that the Act defines the word "employees" as including strikers does not *create* between an employer and a striker the *contract relationship* of employer and employee. Congress cannot by fiat create such relationship. Congress can define the word "employee" as including strikers or any other persons who are not actually employees. So also Congress could define "stock brokers" as including lawyers; and statutory regulations imposed upon stock brokers would then be binding also upon lawyers. But this would not make all lawyers stock brokers in point of fact. So also Congress might impose regulations involving "servants" and from the context of the legislation it might be clear that the word "servants" was intended to include lawyers. Assuming the power of Congress to regulate lawyers, a reference to "servants" where the context of the statute made clear that lawyers were intended to be included in the word "servants", would effectively impose the regulation.

The cases cited by petitioner (P. Br. 42-43) are not in conflict with the principle above announced that strikers do not occupy the legal status of an employee and that they cannot again resume that status until a new contract of employment has been made. They are illustrative of the example above given with reference to servants. In the cases involving the Clayton Act, where reference is made to "employees", the context of the Act clearly shows that it was intended to apply to strikers. Strikers were the only

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[23] *Birmingham Trust & Savings Co.* v. *Atlanta B. & A. Ry. Co.* (D. C. N. D. Ga.), 271 F. 743, 745, 746;
Union Pac. R. R. Co. v. *Ruef* (C. C. D. Neb.), 120 F. 102, 114;
Goldfield Consol. Mines Co. v. *Goldfield Miners Union* (C. C. D. Nev.), 159 F. 500, 519;
Douglas v. *Metropolitan Life Ins. Co.* (Mo.), 297 S. W. 87, 90.

ones against whom it was contemplated that injunctions would be issued. Thus *Michaelson* v. *United States*, 291 F. 940, and *Dail-Overland Co.* v. *Willys-Overland Co.*, 263 F. 171, are not in point. They do not hold that a new contract is unnecessary before a striker can again resume the relationship of employee. They merely hold that strikers were included within the definition of the word "employees" used in the Clayton Act. In *Greenfield* v. *Central Labor Council*, 104 Ore. 236, 192 Pac. 783, strikers were held to be employees within the meaning of a section of an Oregon statute identical in language with Section 20 of the Clayton Act. So also in *Fryns* v. *Fair Lawn Fur Dressing Co.*, 114 N. J. Eq. 462, 168 A. 862, the word "employees" as used in the N. I. R. A. was held to include strikers because it was apparent that Congress intended to include them within the definition of the word "employees." Neither *State* v. *Personett*, 114 Kan. 680, 220 Pac. 520, nor *Uden* v. *Schaeffer*, 110 Wash. 391, 188 Pac. 395 holds that a new contract is not necessary to restore a striker to the status of an employee. They merely call attention to the fact that a striker seeks to return to work on better terms.

In *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134, the statement of the court that "Irrespective of the statute, therefore, the strike did not of itself result in a complete severance of the relationship which had been established between the company and its employees" does not support the Board's contention. It may be conceded that the strike does not, of itself alone, effect a *complete* severance of the relationship, yet it does, nevertheless, sever the *contract* relationship so that it cannot be restored, except by the mutual assent of both parties. The *Jeffery* case does not hold or even state that a new contract is unnecessary before a striker can resume the relationship of employee. In *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138, the court approves the statement in the *Jeffery* case, but again fails to go so far as to state that a striker can resume work without a new contract.

Whatever name the courts may attach to a striker, whether it be striking employee or some other name, and whatever definition Congress may give to the word "employees" whether it includes strikers or not, the fact remains that when an employee goes on strike the contractual relationship of employer and employee terminates, and it cannot again be resumed except upon the making of a new contract. The striker may offer to come back to work upon his terms but he cannot come back until his offer is accepted. Upon such acceptance a new contract of employment arises.

B. If the Act be construed to empower the Board to compel respondent to enter into a contract, it is void.

The Board has ordered that respondent offer employment to five strikers. It is ordered that respondent offer to make a contract with each of them. Petitioner contends that the Act has empowered the Board to make that order and that the order is supported by the Board's findings. It is our contention that if the Act empowers the Board to make such an order the Act is, to that extent, void. We do not believe that Congress can compel any individual, against his will, to enter into such a contract for the performance of obligations. The statements of this Court indicate a fixed opinion that if Congress should attempt to pass such legislation it would be void as violative of the Fifth Amendment. The Court has said of the National Labor Relations Act "the Act does not compel agreements between employers and employees. It does not compel any agreement whatever."[24]

In considering the validity of the Railway Labor Act, as amended in 1934, the Court upheld it, pointing out specifically that it did not "compel the employer to enter into any agreement," implying, it seems to us, that if it had sought to exert such compulsion upon the employer it would have been to that extent void.[25]

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[24] *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 45.

[25] *Virginian Ry.* v. *System Federation,* 300 U. S. 515, 557.

In *National Union Fire Insurance Co.* v. *Wanberg,* 260 U. S. 71, this Court has given even clearer indication that any statute which attempted to impose a contract upon an unwilling individual would be absolutely void. In that case the court had under consideration a North Dakota statute which provided that in the event an agent of an insurance company should accept an application for a policy covering hail insurance, the insurance contract should take effect twenty-four hours after the acceptance of the application unless the company should notify the applicant to the contrary. The contention was made that the statute violated the Fourteenth Amendment by "affirmatively imposing a contract on an insurance company before it has had a chance to consider the circumstances and decide that it wishes to make it." When the argument was made that a "statute mandatory obligation is substituted for freedom of contract, which is just that against which the Fourteenth Amendment was intended to secure persons" the court said:

> "We agree that this legislation approaches closely the limit of legislative power, but not that it transcends it." (p. 74).

The Court clearly implied that if the statute had *imposed* a contract on the insurance company, it would have transcended legislative power, but held that this statute did not impose a contract upon the insurance company, stating as follows:

> "This does not force a contract on the company. It need not accept an application at all or it can make its arrangements to reject one within twenty-four hours. * * *.
>
> There is nothing in the statute under discussion which requires a company to receive applications * * *." (p. 76).

The provisions of the Act approved in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* are not in conflict with the principles above set forth. It is recognized that every contract has a "congenital infirmity" in that it is enacted subject to the power of Congress to change its incidents in so far as those changes are necessary or proper to enable Congress to exercise its delegated powers. This does not mean, however, that Congress can impose a *new* contract upon individuals. Congress can properly add an *incident* to contracts between employers and employees by providing that an employer cannot discharge an employee for the purpose of interfering with the employee's right of engaging in collective bargaining and choosing his representatives for the purpose of such activity.[26] But this is not to say that after the legal relationship of employer and employee has terminated and at a time when it can be resumed only by the execution of a new contract, that Congress can impose that new contract upon the employer or that Congress may empower an administrative board to impose it. Such legislation would be, and the Act here in question is, if it authorizes such procedure, so arbitrary, unreasonable and capricious as to be absolutely void.

This does not mean that where an employer fails to comply with the Act and thus provokes his employees into a strike, he may not be compelled to continue the relationship of employer and employee. The Act provides that an employer may not discriminatorily discharge employees, may not refuse to bargain collectively with their representatives, and may not do other acts which interfere with their fundamental right to organize and bargain collectively. Thus the Act, to this extent, has amended every contract of employment. If the employer breaches that contract, as amended, the employee is not bound to carry out his part

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[26] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*

of the contract and is therefore free to quit, or to stop work, temporarily, without surrendering his contract status.[27] On the other hand, where the employer has not breached the contract, as amended, the employee has no right to cease work and still maintain the status of an employee. There is therefore nothing arbitrary or unreasonable about compelling the employer to carry out his contract by resuming the relationship of employer and employee with his former employees who have ceased working because of his violation of the employee's contract. Upon this ground the decisions in *National Labor Relations Board* v. *Remington Rand, Inc.* (C. C. A. 2; decided Feb. 14, 1938) and *National Labor Relations Board* v. *Bell Oil & Gas Co.*, 91 F. (2d) 509 might be upheld.

The facts in *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134, *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 and *Black Diamond Steamship Corporation* vs. *National Labor Relations Board* (C. C. A. 2; decided Feb. 14, 1938) are distinguishable from the case at bar. In those cases the employees did not strike in the midst of negotiations with the employer; they did, as in the case at bar, strike prior to any unfair labor practice on the part of the employer. However, in those cases, but not in the case at bar, it was found the employer during the strike violated the Act by refusing to negotiate with the strikers, and this fact gives rise to the distinction.

Furthermore, the *Jeffery* case did not consider or decide the constitutional problem which we are here raising. We have examined the briefs of the employer in that case and find that the validity of the Board's order under the

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[27] In 39 Corpus Juris 95, it is said:

> "Instead of treating the contract as rescinded and suing on quantum meruit, a servant who has been wrongfully discharged may treat the contract as continuing, notwithstanding its breach by the master, and sue for damages for the wrongful discharge, either immediately, at any time during, or at the expiration of the term; * * *"

Fifth Amendment was not argued. The court stated that in view of the decisions in *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* and the other cases decided at the same time, contentions going to the constitutionality of the Act had been "virtually abandoned." In *KVOS* v. *Associated Press,* 299 U. S. 269, 279, this Court quoted from *Webster* v. *Fall,* 266 U. S. 507, as follows:

> "Questions which may lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."

The construction which we urge does not impair the Act in so far as it requires the employer to negotiate, during the course of a strike, with strikers who have ceased work in connection with a current labor dispute. Such a requirement, as pointed out in both *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.* and *Virginian Railway Co.* v. *System Federation,* does not impinge upon the employer's constitutional rights. However, to require an employer to negotiate is a far cry from imposing a contract of employment upon an unwilling employer.

The Board argues that it is necessary to construe the Act as empowering the Board to compel an employer to reemploy all strikers whether or not the strike was provoked by a violation of the Act. The reason given is that otherwise an employer might, by acts otherwise quite lawful, such as reducing wages, provoke a strike, so that he might thereby rid himself of various members of a union and thus discourage membership in the union (P. Br., 46). It is not necessary, in order to protect employees against such wrongful acts of the employer, to impose a new contract upon the employer. Such conduct on the part of the employer might well be regarded as a wrongful discharge of the employee. The Board and the courts, where an employer sets out upon such a course of conduct in order that he may by indirection accomplish that which the Act forbids him to do directly, will look

through the transaction and treat it as a discharge of employees, accomplished by a subterfuge.

Under Point III of this argument we have contended that it was not the intention of Congress to compel the employer to enter into new contracts of employment where he did not provoke the strike. If it was the intention of Congress to empower the Board to impose a contract upon an employer under such facts as exist in the case at bar, then the Act is to that extent void, because legislation which empowers an administrative board to *compel* a person to assume contractual relations with another is so obnoxious to the basic principles of our Bill of Rights that it cannot stand.

C. The provisions of the Act, if construed as imposing upon respondent an extension of the contract beyond the agreed term, are as violative of respondent's fundamental rights as compelling a new contract to cover the period beyond the agreed term.

In his dissenting opinion in the court below Judge Garrecht argued that the order of the Board did not impose a new contract upon respondent. The Board adopts this argument (P. Br., 44-45). His argument was, in effect, that Congress in the exercise of its power to regulate commerce had added a new incident to the old contract of employment and that the order of the Board was merely enforcing the old contract as amended by the statute. This argument is not sound because its premise is false. If the provision defining the word "employee" is to be regarded as an amendment to the contract of employment rather than a mere definition of the term "employee," the amendment is as follows:

> "Provided however that notwithstanding the fact that the contract is terminated by the employees ceasing work in a strike, the term of such contract shall be automatically extended to cover the period of the strike."

Thus by legislation Congress has added not an *incident* to the contract but has *created* a contract for a period of time never agreed upon by the parties. The agreement of the parties was that the contract was to continue at the will of either party but was to terminate in the event the employee should strike.[28] Under Judge Garrecht's interpretation, Congress has created a contractual relationship which is to commence at the time of the agreed termination of the contract and is to continue during the strike. If Congress cannot empower the Board to impose a new contract upon the employer, it cannot extend the term of the existing contract and thus empower the Board to deal with the relationship created by the extended term. In either case the employer would be compelled to undertake contractual relations with a person subsequent to the termination of the contract to which he had agreed. There is no difference in the result. In either case the employer would end up by employing persons under compulsion whom he would not have employed but for the provisions of the Act.

Judge Garrecht's construction of the Act is not supported by cases which hold that Congress may modify *incidents* of the contract if such modifications constitute a proper exercise of its delegated power. To extend a contract beyond the period of time to which the parties agreed is not a mere incident of the contract; it is in fact creating a new contract for a new term.[29] This was recognized in

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[28] See *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 207; *Truax* v. *Corrigan*, 257 U. S. 312, 320, 338, 340; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Brown* v. *Central West Coal Co.*, 200 Mich. 174, 166 N. W. 850.

[29] The cases cited by the Board (P. Br. 45, 46), affirming governmental power to "restrict freedom to enter" into contracts, do not, as the Board implies, affirm its power to force *a new contract* upon an unwilling party. They do not affirm the existence of governmental power to "restrict freedom to * * * refrain from entering" into contracts, as the Board euphemistically phrases its startling contention. This, we submit, is a far cry from compelling reinstatement of an employee who has been wrongfully discharged (P. Br. 48, 49). The latter but restores the *status quo*, prior to the wrongful act. The former would impose a new and different *status*.

Block v. *Hirsh,* 256 U. S. 135, where a statute applicable to the District of Columbia provided that contracts of tenants occupying rental property were "to continue notwithstanding the expiration" of their terms, at the option of the tenant, subject to certain regulations. This legislation was emergency legislation incident to the World War with the provision that it should be effective for only two years unless sooner repealed. In upholding the validity of this statute Mr. Justice Holmes pointed out that "a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation." And the court held "the regulation is put and justified only as a temporary measure." This case has been the subject of considerable comment. In *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 416, Mr. Justice Holmes, speaking for the court, said that *Block* v. *Hirsh* "went to the verge of the law." The fact that it was sustainable only as emergency legislation has been referred to in other cases.[30]

If *Block* v. *Hirsh* "went to the verge of the law" what can be said of the Act as here construed by the Board? *Block* v. *Hirsh* was only a temporary measure by which the rental term was to be continued during an emergency. In the case at bar the statute as construed by the Board imposes a contractual relationship upon an employer and employee during the period of a strike and thus enables the Board further to deal with that relationship by compelling the employer to employ persons whom he does not choose to employ. There is nothing temporary about this Act. It is not justified by any emergency.

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[30] *Adkins* v. *Children's Hospital,* 261 U. S. 525;
Tyson and Brother v. *Banton,* 273 U. S. 418;
Home Building & Loan Assn. v. *Blaisdell,* 290 U. S. 398.

D. The purpose of the Act can be accomplished without construing it as empowering the Board to compel employers to enter into contracts.

It is not, in order to accomplish the purpose of the Act, essential to construe it as empowering the Board to compel an employer to reemploy specified strikers or to hire any particular men where his refusal to re-employ or hire constituted forbidden discrimination. Assuming that respondent was guilty of an unfair labor practice in refusing to re-employ the five men, an order could have been made requiring respondent to cease and desist discriminating in the re-employment of the strikers on account of their union activity or membership. That order would not have impinged upon rights guaranteed by the Fifth Amendment for it would not have compelled respondent to enter into any specific contract. It would have left respondent free to choose its employees on the basis of merit, seniority or any other basis except membership or non-membership in a labor organization. The purpose of the Act would have been served by the elimination of the discrimination violative of the Act. If such an order had been made and enforced and if respondent had thereafter discriminated in violation of the Act, the Circuit Court of Appeals would stand ready to hear contempt proceedings and make appropriate orders. The statute should be construed to avoid any substantial doubt of constitutionality.[31] The purpose of the Act can be accomplished without construing it so as to impose, or authorize the Board to impose, any contract upon an employer.

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[31] *Crowell* vs. *Benson*, 285 U. S. 22, 61, 62, 76, and cases cited.

V. Respondent was entitled, under Article III, Sections 1 and 2 of the Constitution[32] to the independent judgment of the court below upon the facts, at least insofar as the "jurisdictional facts"[33] are concerned.

The purpose of the Act is the protection of interstate commerce from interruptions by strikes. The method selected by Congress is to encourage collective bargaining and, without prohibiting strikes, to discourage them, so far as practicable. As a means to this end, Congress set up the Board as a tribunal for the protection and enforcement of those rights of employees which were deemed essential to the effective functioning of the processes of collective bargaining. Congress might have provided for the protection of those rights in either, or both, of two ways. It could have denounced conduct which would invade those rights as a public offense by prohibiting them or by declaring them to be unlawful. Or, it could have provided a system of *civil remedies,* both preventive and remedial, for the protection of those rights. Congress chose the latter course.

The rights which are thus guaranteed are solely the private rights of employees. The "unfair labor practices" defined in the Act are *not public offenses;* they are not prohibited or declared to be unlawful. They are merely invasions of private rights, the effect of which is to entitle the injured employees to the civil remedies, preventive and compensatory, which are afforded by the Act. The Board is a *quasi-judicial* tribunal set up for the adjudication of

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[32] "Section 1. The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *

"Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, * * *."

[33] We are using the expression "jurisdictional fact", somewhat loosely, to describe a fact, the existence of which, under the terms of the Act, is an indispensable condition precedent to the authority of the Board to make the order here in question.

claimed invasions of those rights, and to award the appropriate remedies therefor.

Thus, while the *purpose* of the Act undoubtedly is the *public* purpose of protecting commerce from interruptions by strikes, the *means* adopted to this end consist solely of the providing of *civil remedies* (preventive and compensatory, but *not* punitive) for the protection of *private* rights.

The proceeding before the Board herein was primarily, if not solely, for the enforcement of the private rights of the private complainants, aimed at the securing of an injunction and money damages. The position of the Board, as the nominal plaintiff was closely analogous to that of a guardian ad litem, or a trustee of an express trust, suing to enforce the right of his *cestuis que trustent.* This proceeding, therefore, was, in substance and in effect, a "Case in Law or Equity arising under the Laws of the United States", within the jurisdiction which is vested in the Courts by the Constitution. It follows that the respondent was entitled to "the independent judgment of the Court upon the facts", at least as to the so-called "jurisdictional facts".

If the court below had "enforced" the Board's order, the result thereof would have been, in substance and effect, precisely the same as if each of the five former employees had instituted and maintained to a successful conclusion a bill in equity for the specific enforcement of his alleged employment contract, based upon the employer's alleged breach thereof, with an incidental award of money damages. It is submitted that a proceeding before the Board with this as its paramount purpose and aimed directly at this result is, fundamentally, a case in equity, and thus encroaches upon the constitutional provisions which vest exclusive jurisdiction over "all Cases, in Law and Equity" in the courts of the United States. The order made by the Board herein, in substance and effect, is in all respects equivalent to a declaratory judgment in equity which determines and declares the respective rights and obliga-

tions of the parties, leaving the enforcement thereof to further proceedings (such as, for example, a decree determining and declaring the plaintiff to be the owner of the disputed premises, but leaving the defendant in possession thereof).

It is submitted that the proceeding before the Board in this case was a proceeding primarily, if not exclusively, for the enforcement of strictly private rights in the nature of property rights, for the benefit of the private owners of those rights. In this respect it differs radically and in a vitally important respect from proceedings before the Federal Trade Commission.

It has been supposed by many, and was urged by the Board in the court below, that the Labor Relations Act is substantially parallel in all respects with the Trade Commission Act. This assumption has led to much confusion, but it is not correct. It is true that the Labor Relations Act in its *procedural* provisions is almost entirely parallel with the Trade Commission Act. In the *substantive* provisions, however, there is a difference which is of vital importance.

All proceedings before the Trade Commission are solely, or at least primarily, for the prevention or redress of *public* wrongs. In all such proceedings the real plaintiff is the United States, suing for the prevention or redress of a public offense, namely, an act which has been expressly prohibited or expressly declared to be unlawful. The Labor Board has no jurisdiction over *any* such *public* offense. While in proceedings before the Board it is the nominal plaintiff, the real plaintiff is an employee or group of employees, who are suing for the enforcement of the private property rights which are guaranteed to them by the Act. The Board prepares and issues the complaint for them and prosecutes the proceeding in their behalf, substantially in the capacity of a guardian *ad litem*, or as the trustee of an express trust, suing for the enforcement of the rights of his *cestuis que trustent*.

The wrongs over which the Trade Commission has jurisdiction (15 U. S. C. A. 21, 45) are those which are made public *offenses*, by sections 13, 14, 18, 19 and 45 of U. S. C. A. Title 15 (15 U. S. C. A. 21). Each of those wrongs is expressly prohibited or expressly declared to be unlawful. The doing of any of the prohibited acts therefore is a public offense, a wrong against the United States.

There is no comparable situation under the Labor Relations Act. That Act creates no public offense whatsoever, except the offense of wilfully resisting, impeding or interfering with the Board or its agents in the performance of their duties (Section 12). The Board has no jurisdiction over a prosecution for that offense. Its jurisdiction is strictly limited to proceedings for the enforcement of private rights.

The Act declares and guarantees certain private rights pertaining to a class of private persons, namely, "employees." They are guaranteed the following *private* rights:

> "* * * the *right* to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." (Section 7).
>
> "* * * the *right* at any time to present grievances to their employer." (Section 9(a)).

"* * * the *right* to strike." (Section 13.)

All of the foregoing are private rights inhering in private persons, and constitute property, so that an injunction will issue for the protection thereof. *Texas & N. O. R. Co.* v. *Brotherhood, etc.*, 281 U. S. 548.

In *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc., supra*, this Court said:

> "The history of the Act and its language show that its *ruling purpose* was to protect interstate commerce by *securing to employees the rights* estab-

> lished by Section 7 * * *", (citing *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*; *supra.*)

Again the Court said:

> "To *secure to employees* the *benefits* of self organization and * * * the Board was authorized by Section 10 (c) to order the abandonment of unfair labor practices and to take affirmative action which would carry out the policy of the Act."

That is precisely what the Board did herein, to secure to employees *their* benefits under the Act. Surely, the *rights* of employees, guaranteed to them by the Act, and *their benefits* thereunder, are their private property. See also, to this effect, *National Labor Relations Board* v. *Remington Rand, Inc., supra* and *Black Diamond Steamship Corp.* v. *National Labor Relations Board, supra.*

The Act (Section 8) defines as "unfair labor practices" certain acts of an employer which would tend to invade or infringe those private rights. But it *does not prohibit* any of those unfair labor practices, nor does it declare them to be unlawful. In short, Congress determined that "unfair labor practices" shall have the status of private wrongs, but shall not amount to public offenses. The Act is comparable in this respect to a statute which defines slander and provides a civil remedy by an action for damages. It is, of course, true that the Labor Relations Act was enacted in the public interest. This is equally true of the statute which defines slander and affords a civil remedy therefor. The latter statute undoubtedly was enacted in the belief that the public peace and the public interest would be served by affording that amount of protection to the personal rights of individuals. So here Congress determined that the public interest in interstate commerce would be promoted by a statute guaranteeing the *private* rights of employees and providing *civil* remedies for the protection and redress of those rights.

In *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, this Court held that a proceeding before the Trade Commission is a proceeding for the prevention or redress of a wrong against the public, a public offense, in which proceeding the United States is the real plaintiff; and that any private advantage which may accrue to the complainant in such a proceeding is merely an incident to the righting of a public wrong. In short, the private complainant in such a proceeding occupies a status analogous to that of the "complaining witness" in the conventional criminal prosecution. The Court pointed out that while there is a superficial resemblance between proceedings before the Trade Commission on the one hand, and proceedings before the Interstate Commerce Commission, or the United States Shipping Board, or under the Packers and Stockyards Act, on the other hand, nevertheless there is a difference which is of vital and controlling importance in this connection; namely, proceedings before the Trade Commission relate to public wrongs, whereas some of the proceedings before the other three commissions relate to private wrongs, i. e., invasions of private rights. It is submitted that proceedings before the Labor Relations Board, when regard is had to their fundamental character and primary object, fall inevitably within the latter class. The court said (p. 26):

> "The latter Act [the interstate commerce act] imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the *private* right it affords *a private administrative remedy.*"

We need only to substitute the word "employer" in place of the word "carrier" to make the foregoing statement truly descriptive of the Labor Relations Act. In support of the foregoing statement, the Court pointed out (p. 27) that in a proceeding before the Trade Commission "a complaint may be filed *only* 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.'" This limitation is omitted, signifi-

cantly, in the Labor Relations Act. The court pointed out that

> " * * * to justify the Commission in filing a complaint * * *, the purpose *must* be protection of the *public*. The protection thereby afforded to private persons is the *incident*. Public interest may exist although the practice deemed unfair *does not violate any private right.*" (p. 27).

This is the very opposite of the situation under the Labor Relations Act. The object of a proceeding *thereunder* is the protection of *a private* right. There cannot be a proceeding before the Labor Board except where a private right is alleged to be invaded.

The Trade Commission is not authorized to issue a complaint unless it shall find "* * * that a proceeding by it in respect thereof would be to the interest of the public, * * *;" and in such case it shall issue a complaint stating *its* charges. (15 U. S. C. A. 45.) The corresponding provision of the Labor Relations Act is in diametric contrast thereto. The Board is not authorized to issue a complaint except when "* * * it is charged that any person has engaged in or is engaging in any such unfair labor practice, * * *." (Section 10(b).) In such case, and in such case only, the Board shall have power to issue a complaint "* * * stating *the* charges in that respect, * * *." "Unfair labor practices" violate private rights only.

In short, the Commission may issue a complaint only in respect of a public offense and only when it shall find that the proceeding will be in the public interest; and the complaint so issued is *its* complaint. See also *Federal Trade Commission* v. *Raladam Co.*, 283 U. S. 643, 649. The Board, on the other hand, may issue a complaint only in respect of a private wrong and only when charges shall be presented to it by a private person or persons, and the complaint when

issued shall state *those* charges (i. e. the charges made by the private complainant).[34]

It is true that the government defrays the cost of litigation before the Labor Board, and in this respect the Labor Relations Act resembles the Federal Trade Commission Act rather than the interstate Commerce and other similar statutes. This, however, does not require the conclusion that the government is the real plaintiff. Proceedings before the Labor Board are quite similar in this respect to proceedings before the Small Claims Court in California. In those proceedings the plaintiff, deeming himself aggrieved, goes to the clerk of the court without an attorney and there states orally to the clerk the facts out of which his supposed grievance arises. The clerk, if he deems the facts sufficient, prepares and files a complaint and issues process thereunder. On the return day the two parties appear before the judge without counsel, and the judge conducts the trial and renders judgment. The plaintiff is required to pay a nominal filing fee, but substantially the entire cost of the litigation is borne by the State. The fact remains, however, that the litigation is strictly and solely for the enforcement of private rights and obligations.

It is submitted that the fundamental distinguishing factor, which determines the character of the litigation as either public or private, is whether the *rights* or *obligations* sought to be enforced thereby are in themselves public or private rights and obligations.

It is submitted, therefore, that where, as here, a proceeding is instituted before the Board, by private complainants, which has for its object the reinstatement of the complainants as employees, together with an award of money damages as compensation for wages lost, it is fundamentally and essentially a "Case" in "Equity" arising under "the Laws

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[34] It is interesting to note in this connection that the charges, filed with the Board by the complainants, charged solely a refusal to "re-employ" (R 2).

of the United States," and as such cannot be excluded from the jurisdiction of the courts of the United States.

We are not unmindful of the fact that in *National Labor Relations Board* vs. *Jones & Laughlin Steel Corp.*, in referring to *Texas & N. O. R. Co.* vs. *Brotherhood, supra,* which arose under the Railway Labor Act of 1926, the court said:

> "The requirement of restoration to service, of employees discharged in violation of the provisions of that act, was thus a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety."[35] (p. 48)

That statement apparently was made in response to the contention that the respondent had been unlawfully deprived of his right to a trial by jury. We suggest, with great deference, that it does not describe the situation with entire accuracy in respect of the contention which we are here presenting. It is suggested that, while the sanction imposed in the *Texas* case was a sanction *authorized* by the common law and judicially *imposed* by the court, so likewise is the sanction herein, a sanction *authorized* by the statute and judicially *imposed* by the Board.

Our conclusion, that the order of the Board herein amounts essentially and fundamentally to the award of private redress for private wrongs, consisting of the invasion of private rights, finds support in the decisions of this court. In *Meeker & Co.* v. *Lehigh Valley R. R.,* 236 U. S. 412, at 423 (a case arising before the Interstate Commerce Commission), this Court pointed out that a remedy afforded by law for the purpose of redressing a private injury is a private remedy of a civil nature, even though the wrongful act complained of be a public offense and punishable as such.

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[35] It is, nevertheless, a sanction imposed for the enforcement of a private right.

In *Baer Bros.* v. *Denver & R. G. R. R.*, 233 U. S. 479, at 486, this Court held that an award by the Interstate Commerce Commission, of damages by way of reparation, is the granting of a private remedy for a private wrong, and that the action of the Commission in granting this remedy is quasi-judicial in character. The court said (p. 486):

> "But awarding reparation for the past and fixing rates for the future involved the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its *quasi-judicial* capacity to measure past injuries sustained by a private shipper; the other, in its *quasi-legislative* capacity, to prevent future injury to the public."

So, here, it follows that the award of back pay by the Board was in its nature a private remedy and was made by the Board acting in a judicial, or at least a quasi-judicial, capacity. The portion of the order requiring reinstatement of the men was likewise private in nature and even more emphatically judicial in character, in that it amounted in effect to a decree in equity for the specific enforcement of a contract by means of mandatory and prohibitory injunctions.

It is submitted that respondent was entitled as a matter of constitutional right to a determination by the Court of all issues of fact, which go to the authority of the Board to make this order.

We are not contending herein that respondent was entitled to have the court weigh the evidence and make its own findings of fact upon issues of fact other than those which go to the authority of the Board to make the order requiring the reinstatement of the five men with back pay. Under the provisions of the Act, the Board's authority to make that order was dependent upon the question of fact whether those five men were employees of the respondent at the time

they applied for reinstatement.[86] The Act does not empower the Board to order reinstatement of any person other than "employees". (Section 10(c).) It defines the term "employee" as including "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice. * * * ." (Sections 2 and 3.) There is no claim herein that any unfair labor practice had occurred prior to the time when the men applied for re-employment. The men, therefore, were not employees, unless they had ceased work "as a consequence of, or in connection with, any current labor dispute;" which must have concerned terms or conditions of employment, or employee representation. (Section 2(9).) It follows that the question whether or not they had ceased work in connection with such a current dispute was a question of fact upon which the Board's authority to make the order of reinstatement and for back pay depended.

This Court has held repeatedly that where, as here, an administrative board makes an order enforcing private rights or private obligations, if the authority of the Board so to do depends upon a question of fact, the party upon whom those obligations are imposed is entitled as a matter of constitutional right to a determination of that question of fact by a lawful court of competent jurisdiction. *Crowell* v. *Benson,* 285 U. S. 22, 46-47. In the application of this rule there is a clear distinction between proceedings before the Labor Relations Board for the enforcement of private rights and obligations, and proceedings before the Federal Trade Commission for the enforcement of public rights and obligations. As the court pointed out in the *Crowell* case, *supra* (p. 50):

> "As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and per-

[86] Disregarding, for the time being, the question of discrimination.

> sons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments."

The court then said that, in cases involving *public* rights or obligations, Congress may with propriety confer jurisdiction upon administrative or legislative boards or bodies; whereas in cases involving private rights or obligations wherein a question of constitutional right, or of the board's authority to act, depends upon a question of fact, Congress has no power to withdraw such question of fact from "judicial cognizance." As this Court said in *Den* v. *Hoboken Land & Imp. Co.*, 18 Howard 272, 284:

> "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can * * * withdraw from judicial cognizance any matter which from its nature, is the subject of a suit at the common law, or in equity, * * * ."

The *Crowell* case, *supra,* involved an award made by a deputy commissioner of the United States Employees Compensation Commission under the Longshoremen's and Harbor Workers' Compensation Act. This Court held that the question whether or not the injured man was an *employee* at the time of the injury was a question of fact going to the authority of the Commission to make the award; and consequently that the defendant therein was entitled to have that question of fact determined by a court upon evidence produced before it. The same "jurisdictional" question of fact stands out herein, namely, the question whether or not the five men were *employees* at the time they applied for reinstatement. It follows that respondent herein was entitled to have that fact adjudicated by a court. Upon this subject the court said (pp. 56-57):

> "In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have

> we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law."

At page 60 the court said:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function."

And the court pointed out that the same rule applies to cases where constitutional rights are interposed as a defense, as in the instant case.

In the *Crowell* case, the constitutional validity of the statute was saved by construing it as not requiring the court to accept, as conclusive, findings of the Commission upon questions of "jurisdictional fact" or questions of fact re-

lating to constitutional rights. So here, it is respectfully submitted that the constitutional validity of this Act can be saved only by amending its provisions or by construing them so that the findings of the Board upon "jurisdictional" and constitutional questions of fact will be merely *prima facie,* not conclusive, evidence thereof. Such a provision in the corresponding portion of the Interstate Commerce Commission Act is the saving grace of that statute. In *Meeker & Co.* v. *Lehigh Valley R.R., supra,* 236 U. S. 412, at 430, the court said:

> "It is also urged, as it was in the courts below, that the provision in §16 that, in actions like this, 'the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated' is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.
>
> "This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and *takes no question of fact from either court or jury.*"

The same is true in respect of the United States Shipping Board Act and the Packers and Stockyards Act, and, so far as we are advised, in respect of all other statutes whereby jurisdiction is conferred upon administrative or legislative boards for the arbitrament of constitutionally guaranteed private rights.

In *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, at page 52, this Court said:

> "Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and

> property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. * * * The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

The decision of the Court in *Crowell* v. *Benson, supra,* went further than we have any occasion to ask the Court to go herein. The Court there held, not only that the employer was entitled to the independent judgment of the court upon the "jurisdictional facts", but, also, that he was entitled to a trial *de novo,* in court, upon those issues. We do not go thus far, herein. We contend only that respondent was entitled to the independent judgment of the court below concerning the weight of the evidence upon those issues. We do not contend for a trial *de novo;* nor do we contend that the findings of the Board may be disregarded by the court. We contend only that the Act, if it be construed as requiring that the findings of the Board upon "jurisdictional facts", or upon facts upon which the constitutional rights of the respondent depend, shall be conclusive, is, in that respect, constitutionally invalid.

There was a strong dissent, by three of the justices in *Crowell* v. *Benson.* As we read the dissenting opinion, the dissent was only from that part of the majority decision which affirmed the right to a trial *de novo.* Mr. Justice Brandeis said:

> "The question is: Upon what record shall the district court's review of the order of the deputy commissioner be based?" (p. 66.)

He suggested a construction of the Act as:

> " * * * committing to the deputy commissioner the simple function of *collecting the evidence* upon which *the court will* ultimately decide the issue." (p. 77.)

Again he said, referring to the findings of the deputy commissioner:

> " * * * we assume for the purposes of this discussion, [they] may be open even on *all questions of the weight of the evidence.*" (p. 88.)

Respondent did not have the benefit of the independent judgment of the court below upon *any* issues of fact. Judge Wilbur (R. 78, 88), Judge Garrecht (R. 92) and, by implication, Judge Mathews (R. 90), all assumed that all of the Board's findings, if supported by evidence, were conclusive upon the court. Judge Wilbur predicated his conclusions solely upon the Board's findings. Judges Mathews and Garrecht reviewed the evidence *only* for the purpose of ascertaining whether there was *any* evidence to support certain of the findings. They arrived at conflicting conclusions upon *that* question. It is clear that neither of them made any independent finding, based upon his own appraisal of the evidence.

It is at least reasonably possible, and we think it altogether probable, that the findings of the court below, if made upon the basis of its independent appraisal of the record, according due consideration to the Board's findings, would have been so different therefrom as to leave no factual basis for any portion of the Board's order. As pointed out *supra,* if there was actually a "controversy concerning terms, tenure or conditions of employment" at the time of the strike, it must have occurred in New York; and there is no competent evidence of what occurred there. There is only a modicum of "double hearsay" and "triple hearsay". This in the face of the fact that Salisbury, who was supposed to be a party to that controversy, was present at the hearing before the Board and was sworn as a witness. It

is unlikely that judges, trained in the rules of evidence, would have been satisfied with such tenuous and "gossamer" evidence under those circumstances.

On the other hand, there is evidence that, *if* there was a "controversy" in New York, it was quite likely a controversy between the marine operators and the respondent. *They were not employees of respondent,* and therefore could not have had a controversy with *respondent* "concerning terms, tenure or conditions of employment", within the meaning of the Act, i. e., terms of employment of respondent's employees. The marine operators are the "men who work the ships" at sea. They are never ashore except when their ships come in (R. 153). The evidence (R. 1098-9) and the findings indicate (R. 20) that each marine operator is an employee, not of a radio company, but of the ship on which he works. The radio companies merely *recommend* operators for employment by the ships. There were two proposed contracts which were to be presented to respondent in New York, at some time after September 13th,—the marine contract and the point-to-point contract (R. 20, 21). The evidence does not show whether both actually were presented, or only one. It does show, however, that the Board's finding that the point-to-point agreement was presented to Stone, in San Francisco, September 13th, is contrary to the Board's own evidence. The discussion on that day related to the proposed marine contract. "Bash had no copy of *our* agreement with him and hence matters pertaining to *our* agreement were lightly touched * * *" (R. 1098).

It is probable, from the evidence (R. 1098-9), that if there was a "controversy" in New York, it was over the marine contract. If so, it did not concern "terms, tenure or conditions of employment," or representation of employees. (There is no claim that respondent refused to bargain with the union.) It concerned the grievance of the marine operators that "Mackay * * * was *recommending* non-A. R. T. A. marine operators to the steamship com-

panies." The Board so found (R. 20). It is therefore altogether probable, from the evidence, confirmed to some extent by the findings, that when the point-to-point operators in San Francisco walked out, they did so to give moral support to the marine operators in their grievance over the practice which Mackay pursued in "recommending operators to the steamship companies."[37] In our "brief in opposition" we referred to this as a "sympathetic strike." Counsel say that this suggestion "is in the most exact sense frivolous." (P. Br. 31.) We did not so intend it. Perhaps it was not, in the technical sense, a "sympathy strike." But that is what the employees called it, and there is no doubt that *they* so regarded it. (R. 1099.)

We have referred to the evidence, to this extent, only for the purpose of showing the likelihood that the court below would have found the facts differently, if they had weighed the evidence and exercised their independent judgment thereon. It seems to us that we can justly claim to be "aggrieved" by their omission to do so. This is because of the probability that, if they had done so, this case would not have reached this Court, or would have come before the Court upon a different factual basis presenting different questions of law.

The question here raised is of great public importance, not only to the Board and to this respondent, but to all employers and employees. We urge, with great deference, but none the less earnestly, that the Court may see fit to decide it in this case.

VI. This case is not properly before this Court because the petition for writ of certiorari was not filed within three months after entry of the final judgment of the court below.

The jurisdiction of this Court to review decisions of Circuit Courts of Appeals is defined by Sections 347 and 350 of Title 28 of the U. S. Code. Section 350 provides that

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(37) "* * * Mr. Salisbury had advised that we go on strike at this time *in conjunction* with the New York local." (R. 176).

no writ of certiorari "to bring any judgment or decree before the Supreme Court for review shall be allowed or entered unless application therefor be duly made within three months after the entry of such judgment or decree. . . ." This limitation is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 418.

The original judgment of the court below denying the petition of the National Labor Relations Board for enforcement of its order herein was filed and entered January 11, 1937. However, petitioner does not seek a review of this judgment, but of a "judgment" entered, after a so-called rehearing, on October 19, 1937. (R. 124, P. 2.) Unless the judgment of October 19, 1937, was entered within the proper exercise of the powers conferred upon the court below by the Act, it is a nullity, with the result that the judgment of January 11, 1937, was the final judgment herein, and the petition for certiorari was filed more than nine months too late. It is the contention of the respondent that the "rehearing" in the court below was held after the jurisdiction of that court had been exhausted under the provisions of the Act. In accordance with this contention respondent duly caused its exceptions to be noted to the order entered herein by the lower court on May 17, 1937, granting the petition for rehearing. (R. 112.)

A. The court below had no authority under the National Labor Relations Act to grant a rehearing. Therefore, the judgment of January 11, 1937, was the final judgment of the court below, and this petition for certiorari was filed too late.

The jurisdiction of the Circuit Court of Appeals to review decisions and orders of the National Labor Relations Board is conferred by Section 10(e) of the National Labor Relations Act. In proceeding under this section the court below was not exercising its general jurisdiction as an appellate court but was functioning as a special statutory court; not as a court of appeal but as a court of the first instance. It is, in fact, a newly created court of limited jurisdiction which never existed prior to the enactment of

the Act. As such, it possesses such powers, duties and jurisdiction as are conferred upon it by that Act and no more.

The court's powers under the Act are stated in Section 10(e) thereof, as follows:

> "* * * to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

In addition to the foregoing, the court, upon a proper and seasonable application for leave to adduce additional evidence

> "* * * may order such additional evidence to be taken before the Board * * *."

The foregoing comprise all of the powers expressly granted to the court in this Act, and under the rule, *expressio unius exclusio alterius,* no additional powers can be implied, other than those reasonably necessary to enable the court to perform the duties imposed upon it.

It may be doubted that any court ever was constituted with narrower jurisdiction than this, to-wit, with only the power to enforce, modify and enforce, or set aside orders of the Board; and to grant temporary injunctive relief as an incident thereto. It is submitted that the only implied powers possessed by this special statutory court are those which are essential to the performance of the duties imposed upon it by the Act, to-wit, the power to punish for contempt and the power to make its records speak the truth. This latter does not include the power to change its judgment after the same has become final, or to grant a rehearing for the purpose of reconsidering its final judgment. This is not only unnecessary to the performance of the prescribed duties, but would frustrate one of the avowed policies of the Act, namely, the prompt determination of all labor disputes.

These provisions of the National Labor Relations Act were copied, substantially verbatim, from the corresponding provisions of the Federal Trade Commission Act, 15 U. S. C. 45. Prior to their adoption in the instant Act it had been held that a circuit court of appeals when functioning thereunder possesses no general jurisdiction or "inherent" or implied powers. In *Federal Trade Commission* v. *Balme,* 23 F. (2d) 615, at 618, the court said:

> "The Federal Trade Commission Act confers special statutory jurisdiction, and the extent of such jurisdiction and the conditions of its exercise over subjects or persons must necessarily depend upon the terms in which the jurisdiction is thus conferred. It does not depend upon the rank of the court upon which it is conferred. It must be strictly pursued because the court does possess jurisdiction over other subjects or persons more extended and general."

In *Chamber of Commerce* v. *Federal Trade Commission, supra,* 280 F. 45, at 47, the court said:

> "This act creates powers not otherwise conferred upon Circuit Courts of Appeals, and such courts are limited strictly to the powers thus specified."

It is a settled rule of statutory construction that when a statute which has been judicially construed is reenacted in the same or substantially the same terms, the Congress is presumed to be familiar with that construction and to have adopted it as part of the law, unless a different construction is expressly required. *Dollar Sav. Bank* v. *United States,* 19 Wall. 227, 237; *Camp* v. *Gress,* 250 U. S. 308, 315, 316; *Heald* v. *Dist. of Columbia,* 254 U. S. 20, 22, 23.

The application of this rule to the instant problem constrains the conclusion that Congress, in enacting the National Labor Relations Act in the light of the construction theretofore placed by the courts upon the Federal Trade Commission Act, intended to grant to the courts the several powers enumerated therein and none other. It fol-

lows that when the court herein had rendered its self-executing judgment denying the Board's petition, and had caused the same to be entered without reservation, it had no power thereafter to entertain or to grant a petition for rehearing. It is of course conceded that if the court had entered a decree for the enforcement of the Board's order by injunction, it would have retained jurisdiction so long as such injunction remained in force. But that is not this case.

Not only does this Act omit (*ex industria* as we think) to confer power upon the court to grant a rehearing, but the clear implication of its provisions is that the court shall not possess that power. It provides, Section 10(e), that the

> "* * * judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States * * * as provided in sections 239 and 240 of the Judicial Code as amended (U. S. C., Title 28, secs. 346 and 347)."

This is tantamount to declaring that there shall be no review of the judgment except by the Supreme Court. This means that there shall be no rehearing by the court below, because a rehearing is a review of the case upon the same record by the same court. *United States* v. *Bentley & Sons Co.*, 292 F. 229, 237.

Another circumstance which tends to confirm the conclusion that a rehearing after final judgment is not authorized under this Act is the provision in Section 10(i) thereof, that

> "Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed."

Petitions for rehearing are always dilatory in effect, regardless of their intent. The proceedings incident to the purported rehearing herein caused a delay of more than nine months from the entry of the final judgment to the reentry of the same judgment.

It is submitted that the judgment entered January 11, 1937, was and is the final judgment herein and that all proceedings of the Circuit Court of Appeals, subsequent thereto, were *coram non judice* and of no effect.

B. The court below, while functioning as a "labor relations court", had no "inherent power" to grant a rehearing "before the expiration of the term".

Counsel point to the inherent power of the district courts, while functioning in the exercise of their general jurisdiction[38] in law or equity, to grant a rehearing after judgment, "before the expiration of the term" (P. Br. 71). Counsel argue that the court below possessed the same "inherent power" while functioning as a "labor relations court". The conclusion is a *non sequitur*. At the time of the adoption of our Constitution, the power to grant a rehearing, within the term of court, after judgment, had become recognized and established as one of the "inherent powers" possessed by courts of *general* jurisdiction in law or equity. Therefore, when our district courts were created and endowed with such general jurisdiction,[38] it was concluded that this power of rehearing inhered in such grant. Consequently the federal courts have prescribed in their rules of court, the limits of their respective terms of court. We know of no instance, however, where an inferior court,[39] of narrow and strictly limited "jurisdiction", has been held to possess this "inherent power". Inasmuch as the possession of this power is not at all necessary to the adequate functioning of the "labor relations court", it cannot be said to have been granted by implication.

It is true that this power has been assumed and exercised by courts, in some instances, when functioning under the

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[38] General jurisdiction within the field of federal jurisprudence.

[39] Notwithstanding the lofty position and great dignity of the circuit courts of appeals, it is submitted that, when functioning as "labor relations courts", they are properly described as "inferior courts of limited jurisdiction".

Trade Commission Act, and, once, when functioning under this Act. But in no case in which this has been done, (so far as we have been able to learn), has the question of the court's power so to do been raised by anyone.

If either of the foregoing contentions is sound, it follows that the judgment entered January 11, 1937, was and is the final judgment in said proceeding; that the proceedings thereafter taken therein, including the purported decision of October 19, 1937 (which did not purport to change in any respect the judgment of January 11, 1937), were *coram non judice* and an utter nullity; with the result that this petition for certiorari, which was filed more than ten months after the entry of the final judgment, is too late and should be dismissed for want of jurisdiction.

VII. The order is so arbitrary and capricious that the court below was warranted in denying its enforcement.

For the reasons above stated, the Board should not have ordered reinstatement of the five employees specified in the order and should not have ordered respondent to cease and desist discharging members of A. R. T. A. However, aside from the question of the propriety of any order as to discharge of the five individuals or as to any other members of A. R. T. A., the order is arbitrary and capricious and goes beyond any reasonable application of the law. The order is, first, "to make whole" said five individuals "for any loss of pay that they have suffered by reason of their discharge." The order then proceeds to more than make them whole by requiring payment not only of their normal wages from the date of discharge (which never occurred) "to the date of such offer of reinstatement" less only "the amount earned subsequent to discharge *as shown in the Findings of Fact.*"

Obviously, the amount shown in the Findings of Fact as having been earned by these five individuals can be only

the amount to the date of the conclusion of the hearing before the Trial Examiner, on the 20th of December, 1935. More than two years have elapsed since that date. These five individuals have undoubtedly had other employment and earned other wages during this period of two years. Yet the order of the Board requires the payment of full wages for this two year period without any deduction for wages earned subsequent to December 20, 1935. This is, in effect, a *penalty* and beyond the remedial powers of the Board.

Paragraph (c) of the order, in requiring the respondent to refrain from discharging members of A. R. T. A. in the future does not place any limitation upon such a drastic mandate. The order as written would prevent discharge for any reason. If any order at all relating to discharge were admissible, it should be limited to a discharge because of discrimination by reason of membership in the union.

Section 10 (e) of the Act provides that the Circuit Court of Appeals shall have power to make or enter an order "upon the pleadings, testimony and proceedings * * * a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board."

We again emphasize that the respondent, as a public service corporation, required by the Federal Communications Act to give service to the public was under the obligation of keeping its services open and available to the public, that its transfer of other employees (not strikebreakers) to San Francisco for the purpose of keeping its services open was in accord with its obligations as such a public service carrier and that in no case that has been decided by any Circuit Court of Appeals has there been any enforcement order issued to compel discharge of existing employees who were employed prior to the date of any unfair labor practice.

Conclusion.

It is submitted that, if any one of respondent's contentions, *supra,* be sound, it follows, regardless of the merit or demerit of the other contentions, that the judgment of the court below should be affirmed.

Respectfully submitted,

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March, 1938.

SUPREME COURT OF THE UNITED STATES.

No. 706.—October Term, 1937.

National Labor Relations Board, Petitioner, *vs.* Mackay Radio & Telegraph Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 16, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

The Circuit Court of Appeals refused[1] to decree enforcement of an order of the National Labor Relations Board.[2] We granted certiorari because of an asserted conflict of decision.[3]

The respondent, a California corporation, is engaged in the transmission and receipt of telegraph, radio, cable, and other messages between points in California and points in other states and foreign countries. It maintains an office in San Francisco for the transaction of its business wherein it employs upwards of sixty supervisors, operators and clerks, many of whom are members of Local No. 3 of the American Radio Telegraphists Association, a national labor organization; the membership of the local comprising "point-to-point" or land operators employed by respondent at San Francisco. Affiliated with the national organization also were locals whose members are exclusively marine operators who work upon ocean going vessels. The respondent, at its San Francisco office, dealt with committees of Local No. 3; and its parent company, whose headquarters were in New York, dealt with representatives of the national organization. Demand was made by the latter for the execution of agreements respecting terms and conditions of employment of marine and point-to-point operators. On several occa-

[1] 87 F. (2d) 611; 92 F. (2d) 761.

[2] 1 N. L. R. B. 201.

[3] See Jeffery-DeWitt Insulator Co. *v.* National Labor Relations Board, 91 F. (2d) 134; National Labor Relations Board *v.* Bell Oil & Gas Co., 91 F. (2d) 509; National Labor Relations Board *v.* Carlisle Lumber Co., 94 F. (2d) 138; Black Diamond S. S. Corp. *v.* National Labor Relations Board, 94 F. (2d) 875.

sions when representatives of the union conferred with officers of the respondent and its parent company the latter requested postponement of discussion of the proposed agreements and the union acceded to the requests. In September 1935 the union pressed for immediate execution of agreements and took the position that no contract would be concluded by the one class of operators unless an agreement were simultaneously made with the other. Local No. 3 sent a representative to New York to be in touch with the negotiations and he kept its officers advised as to what there occurred. The local adopted a resolution to the effect that if satisfactory terms were not obtained by September 23 a strike of the San Francisco point-to-point operators should be called. The national officers determined on a general strike in view of the unsatisfactory state of the negotiations. This fact was communicated to Local No. 3 by its representative in New York and the local officers called out the employes of the San Francisco office. At midnight Friday, October 4, 1935, all the men there employed went on strike. The respondent, in order to maintain service, brought employes from its Los Angeles office and others from the New York and Chicago offices of the parent company to fill the strikers' places.

Although none of the San Francisco strikers returned to work Saturday, Sunday, or Monday, the strike proved unsuccessful in other parts of the country and, by Monday evening, October 7th, a number of the men became convinced that it would fail and that they had better return to work before their places were filled with new employes. One of them telephoned the respondent's traffic supervisor Monday evening to inquire whether the men might return. He was told that the respondent would take them back and it was arranged that the official should meet the employes at a downtown hotel and make a statement to them. Before leaving the company's office for this purpose the supervisor consulted with his superior, who told him that the men might return to work in their former positions but that, as the company had promised eleven men brought to San Francisco they might remain if they so desired, the supervisor would have to handle the return of the striking employes in such fashion as not to displace any of the new men who desired to continue in San Francisco. A little later the supervisor

met two of the striking employes and gave them a list of all the strikers together with their addresses, and the telephone numbers of those who had telephones, and it was arranged that these two employes should telephone the strikers to come to a meeting at the Hotel Bellevue in the early hours of Tuesday, October 8th. In furnishing this list the supervisor stated that the men could return to work in a body but he checked off the names of eleven strikers who he said would have to file applications for reinstatement which applications would be subject to the approval of an executive of the company in New York. Because of this statement the two employes, in notifying the strikers of the proposed meeting, with the knowledge of the supervisor, omitted to communicate with the eleven men whose names had been checked off. Thirty-six men attended the meeting. Some of the eleven in question heard of it and attended. The supervisor appeared at the meeting and reiterated his statement that the men could go back to work at once but read from a list the names of the eleven who would be required to file applications for reinstatement to be passed upon in New York. Those present at the meeting voted on the question of immediately returning to work and the proposition was carried. Most of the men left the meeting and went to the respondent's office Tuesday morning, Oetober 8th, where on that day they resumed their usual duties. Then or shortly thereafter six of the eleven in question took their places and resumed their work without challenge. It turned out that only five of the new men brought to San Francisco desired to stay.

Five strikers who were prominent in the activities of the union and in connection with the strike, whose names appeared upon the list of eleven, reported at the office at various times between Tuesday and Thursday. Each of them was told that he would have to fill out an application for employment; that the roll of employes was complete, and that his application would be considered in connection with any vacancy that might thereafter occur. These men not having been reinstated in the course of three weeks the secretary of Local No. 3 presented a charge to the National Labor Relations Board that the respondent had violated Section 8(1) and (3) of the National Labor Relations Act.[4] Thereupon the Board filed a com-

[4] U. S. C. Supp. II, Tit. 29, § 158 (1) and (3).

plaint charging that the respondent had discharged and was refusing to employ the five men who had not been reinstated to their positions for the reason that they had joined and assisted the labor organization known as Local No. 3 and had engaged in concerted activities with other employes of the respondent for the purpose of collective bargaining and other mutual aid and protection; that by such discharge respondent had interfered with, restrained, and coerced the employes in the exercise of their rights guaranteed by Section 7[5] of the National Labor Relations Act and so had been guilty of an unfair labor practice within the meaning of Section 8(1) of the Act. The complaint further alleged that the discharge of these men was a discrimination in respect of their hire and tenure of employment and a discouragement of membership in Local No. 3, and thus an unfair labor practice within the meaning of Section 8(3) of the Act.

The respondent filed an answer denying the allegations of the complaint, and moved to dismiss the proceeding on the ground that the Act is unconstitutional. The motion was taken under advisement by the Board's examiner and the case proceeded to hearing. After the completion of its testimony the Board filed an amended complaint to comport with the evidence, in which it charged that the respondent had refused to re-employ the five operators for the reason that they had joined and assisted the labor organization known as Local No. 3 and engaged with other employes in concerted activities for the purpose of collective bargaining and other mutual aid and protection; that the refusal to re-employ them restrained and coerced the employes in the exercise of rights guarateed by Section 7 and so constituted an unfair labor practice within Section 8(1) of the Act. The amended complaint further asserted that the refusal to re-employ the men discriminated in regard to their hire and tenure of employment and discouraged membership in Local No. 3 and thus amounted to an unfair labor practice under Section 8(3) of the Act. The respondent entered a general denial to the amended complaint and presented its evidence. At the conclusion of the testimony the Board transferred the cause for further hearing before the members of the Board at Washington and after oral argument and the filing of a brief, made its findings of fact.

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[5] U. S. C. Supp. II, Tit. 29, § 157.

The subsidiary or evidentiary facts were found in great detail and, upon the footing of them, the Board reached conclusions of fact to the effect that Local No. 3 is a labor organization within the meaning of the Act; that "by refusing to reinstate to employment" the five men in question, "thereby discharging said employes", the respondent by "each of said discharges", discriminated in regard to tenure of employment and thereby discouraged membership in the labor organization known as Local No. 3, and, by the described acts "has interfered with, restrained, and coerced its employes in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act". As conclusions of law the Board found that the respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8, subsections (1) and (3), and Section 2, subsections (6) and (7)[6] of the Act. It entered an order that respondent cease and desist from discharging, or threatening to discharge, any of its employes for the reason that they had joined or assisted Local No. 3 or otherwise engaged in union activities; from interfering with, restraining or coercing its employes in the exercise of the rights guaranteed by Section 7 of the Act; offer the five men immediate and full reinstatement to their former positions, without prejudice to rights and privileges previously enjoyed, and make each of them whole for any loss of wages due to their discharge; post notices that the respondent would not discharge or discriminate against members of, or those desiring to become members of, the union, and keep the notices posted for thirty days.

As permitted by the Act, the Board filed in the Circuit Court of Appeals a transcript of the record of its proceeding, and a petition for enforcement of its order. In its answer the respondent denied the jurisdiction of the court on the ground that the Act violated Article III, and the Fifth, Seventh, and Tenth Amendments, of the Constitution; that the order amounted to an abuse of discretion because arbitrary and capricious, and was not supported by the evidence; that the trial examiner erred in his rulings on evidence; that the Board erred in overruling exceptions to his rulings, and that the Board's findings of fact and conclusions of law were erroneous.

[6] U. S. C. Supp. II, Tit. 29, § 152 (6) (7).

Upon the hearing before the Circuit Court of Appeals one judge held that the action of the Board was within the power sought to be conferred upon it by the statute but that the grant of power violated the due process clause of the Fifth Amendment and the award of back pay to the employes, without a jury trial, violated the Seventh Amendment. Another judge held that as the statute defined employes to include a person whose work had ceased "as a consequence of, or in connection with, any current labor dispute", and since there was no allegation, evidence, or finding as to such a dispute, the strikers had ceased to be employes within the meaning of the Act and the respondent's treatment of them could not violate the Act. One judge dissented, holding that the Board's order was within its statutory authority and did not violate the Constitution. A petition and supplemental petition for rehearing were granted and, after argument, the court reaffirmed its former decision. The judge who had previously declared the Board's action within the terms of the statute, but unconstitutional, construed the Act as not intended to work the unconstitutional result of compelling an employer to enter into a contract of employment against his will and, hence, as requiring only that the strikers be reinstated to the position of applicants for employment rather than employes. The other judges adhered to the views they had previously expressed.

The petitioner contends the court erred in holding that men who struck because of a failure of negotiations concerning wages and terms of employment ceased to be employes within the meaning of the statute; erred in not holding it an unfair labor practice, forbidden by the statute, for an employer to discriminate because of union activities in the reinstatement of men who have gone on strike because of a failure of negotiations concerning wages and terms of employment; erred in failing to hold that the Act authorizes the Board to order reinstatement of persons thus discriminated against; and one of the judges erred in holding that the Act, if construed to authorize the Board to require such reinstatement, violates the Fifth Amendment.

On the other hand, the respondent insists that it was not accorded due process of law because the unfair labor practice charged in the original complaint was abandoned and the action of the Board was based upon a conclusion of fact not within

the issues presented; that there is no basis for the Board's order because there is no finding that the strikers ceased work as a consequence of, or in connection with, any labor dispute, as defined in the statute; that the Act does not empower the Board to compel an employer to re-employ or reinstate those who have abandoned negotiations and gone on strike prior to any unfair labor practice, where the employer, after the strike is effective, and before committing any unfair labor practice, has permanently employed others in place of the strikers; that, if the Act be held to authorize the Board's order, it violates the Fifth Amendment; that Article III of the Constitution requires that the court render its independent judgment upon the quasi-jurisidictional facts upon which the Board's order was based; that the Board's order was, in the light of the facts, so arbitrary and capricious as to warrant the court's refusal to enforce it; and that the case is not properly before us because certiorari was not sought within the time fixed by law.

We hold that we have jurisdiction; that the Board's order is within its competence and does not contravene any provision of the Constitution.

First. Within the thirty days prescribed by the rules of the Circuit Court of Appeals the petitioner moved for a rehearing and for leave, if deemed appropriate, to take further evidence and add the same to the record before the Board. While this application was pending a supplemental petition for rehearing was presented. During the term the court entertained both petitions and granted a rehearing and, after oral argument and submission of briefs, wrote further opinions based upon the petitions for rehearing. We think the court had not lost jurisdiction of the cause; that its final judgment was the order entered upon the petitions for rehearing and that the three months within which the petitioner must apply for certiorari ran from the date of the order dismissing the petition for rehearing and confirming the original order.

Second. Under the findings the strike was a consequence of, or in connection with, a current labor dispute as defined in Section 2(9) of the Act. That there were pending negotiations for the execution of a contract touching wages and terms and conditions of employment of point-to-point operators cannot be denied. But it is said the record fails to disclose what caused these negotiations to fail or to show that the respondent was in any wise in

fault in failing to comply with the union's demands; and, therefore, for all that appears, the strike was not called by reason of fault of the respondent. The argument confuses a current labor dispute with an unfair labor practice defined in Section 8 of the Act. True there is no evidence that respondent had been guilty of any unfair labor practice prior to the strike but within the intent of the Act there was an existing labor dispute in connection with which the strike was called. The finding is that the strike was deemed "advisable in view of the unsatisfactory state of the negotiations" in New York. It was unnecessary for the Board to find what was in fact the state of the negotiations in New York when the strike was called, or in so many words that a labor dispute as defined by the Act existed. The wisdom or unwisdom of the men, their justification or lack of it, in attributing to respondent an unreasonable or arbitrary attitude in connection with the negotiations, cannot determine whether, when they struck, they did so as a consequence of or in connection with a current labor dispute.

Third. The strikers remained employes under Section 2(3) of the Act which provides: "The term 'employee' shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, . . ." Within this definition the strikers remained employes for the purpose of the Act and were protected against the unfair labor practices denounced by it.

Fourth. It is contended that the Board lacked jurisdiction because respondent was at no time guilty of any unfair labor practice. Section 8 of the Act denominates as such practice action by an employer to interfere with, restrain, or coerce employes in the exercise of their rights to organize, to form, join or assist labor organizations, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or "by discrimination in regard to . . . tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:" . . . There is no evidence and no finding that the respondent was guilty of any unfair labor practice in connection with the negotiations in New York. On the contrary, it affirmatively appears that the respondent was

negotiating with the authorized representatives of the union. Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although Section 13 provides, "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike", it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them.[7] The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by Section 8.

Fifth. The Board's findings as to discrimination are supported by evidence. We shall not attempt a discussion of the conflicting claims as to the proper conclusions to be drawn from the testimony. There was evidence, which the Board credited, that several of the five men in question were told that their union activities made them undesirable to their employer; and that some of them did not return to work with the great body of the men at 6 o'clock on Tuesday morning because they understood they would not be allowed to go to work until the superior officials had passed upon their applications. When they did apply at times between Tuesday morning and Thursday they were each told that the quota was full and that their applications could not be granted in any event until a vacancy occurred. This was on the ground that five of the eleven new men remained at work in San Francisco. On the other hand, six of the eleven strikers listed for separate treatment who reported for work early Tuesday morning, or within the next day or so, were permitted to go back to work and were not

[7] Compare National Labor Relations Board v. Bell Oil & Gas Co., 91 F. (2d) 509.

compelled to await the approval of their applications. It appears that all of the men who had been on strike signed applications for re-employment shortly after their resumption of work. The Board found, and we cannot say that its finding is unsupported, that, in taking back six of the eleven men and excluding five who were active union men, the respondent's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them.

As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings.

Sixth. The Board's order does not violate the Fifth Amendment. The respondent insists that the relation of employer and employe ceased at the inception of the strike. The plain meaning of the Act is that if men strike in connection with a current labor dispute their action is not to be construed as a renunciation of the employment relation and they remain employes for the remedial purposes specified in the Act. We have held that, in the exercise of the commerce power, Congress may impose upon contractual relationships reasonable regulations calculated to protect commerce against threatened industrial strife. *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation,* 301 U. S. 1, 48. The Board's order there sustained required the reinstatement of discharged employes. The requirement interfered with freedom of contract which the employer would have enjoyed except for the mandate of the statute. The provision of the Act continuing the relationship of employer and employe in the case of a strike as a consequence of, or in connection with, a current labor dispute is a regulation of the same sort and within the principle of our decision.

Seventh. The affirmative relief ordered by the Board was within its powers and its order was not arbitrary or capricious.

As we have held in *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, No. 413, October Term, 1937, the relief which the statute empowers the Board to grant is to be adapted to the situation which calls for redress. On the basis of the findings, five men who took part in the strike, were discriminated against in connection with a blanket offer to reinstate striking employes. The Board enjoined further discrimination against employes by reason of union affiliation but it could not grant complete relief in respect of the five men short of ordering that the discrimination be neutralized by their being given their former positions and reimbursed for the loss due to their lack of employment consequent upon the respondent's discrimination. The order is criticized as arbitrary in that it is said to award back pay to date of reinstatement with deductions only for what was earned to the date of the order. We do not so read it, and the Board admits that credit must be given for all sums earned to date of reinstatement, and so construes the order. It is further said that the order arbitrarily and unreasonably requires the notices to be posted to state that respondent will not discharge its reinstated employes for any reason whatever. This clause of the order is inartificially drawn, and counsel for the Board admit that it should be read in connection with the remainder of the order forbidding discharge on the ground of union activity.

Eighth. The respondent was not denied a hearing with respect to the offense found by the Board. The respondent says that it was summoned to answer a complaint that it discriminated by discharging the five men and that, after all the evidence was in, this complaint was withdrawn and a new one presented asserting that its refusal to re-employ the five men was the head and front of its offending. Then it is said that when the Board came to make its findings it reverted to the position that what the respondent did had not been a failure to employ but a wrongful discharge. Thus the respondent claims that it is found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The position is highly technical. All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union

activities. If there was a current labor dispute the men were still employes by virtue of Section 2(3), and the refusal to let them work was a discharge. The respondent says that as the Board failed to find, in so many words, that there was a current labor dispute its conclusion of fact that the men were discharged has no basis. But the Board found that the strike was called because the strikers were informed that the negotiations for a working agreement in New York were not proceeding satisfactorily. We think its action cannot be overturned for the mere reason that it failed to characterize the situation as a current labor dispute. The respondent further urges that, when the amended complaint was filed and the original one withdrawn, the charge it had to meet was a refusal to re-employ; that the phrase "re-employ" means "employ anew"; that if the Board had found a failure to employ the five men because of discrimination forbidden by the Act, the findings would have followed the complaint, whereas the Board, in its conclusions of fact, referred to respondent's action as "refusal to reinstate to employment" and as a discharge; and the argument is that the findings do not follow the pleadings.

A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether, when the strike failed and the men desired to come back and were told that the strike would be forgotten and that they might come back in a body save for eleven men who were singled out for different treatment, six of whom, however, were treated like everyone else, the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory.

At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling.

It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The respondent now asserts that the failure of the Board to follow its usual practice of the submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan* v. *United States,* 298 U. S. 468, 478. The contention that the respondent was denied a full and adequate hearing must be rejected.

Ninth. The other contentions of the respondent are overruled because foreclosed by earlier decisions of this court.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to that court for further proceedings in conformity with this opinion.

So ordered.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.